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New York (State) Reports. *Q* Supreme Court.

PRACTICE REPORTS

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW YORK

VOLUME XLVI.

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PRACTICE REPORTS.

SUPREME COURT.

PLINY PHELPS *et al.* agt. GEORGE W. WOOD *et al.*,
impleaded, &c.

In an action in *equity* for an accounting between cotenants, where the complaint asks for relief, and the referee on the trial finds and orders judgment for the plaintiffs and certain of the defendants for the respective sums due each, but without deciding anything respecting the *costs* of the action, the plaintiffs on entering judgment are not entitled to enter it *with costs*.

Costs in such actions are in the discretion of the referee, and where he has not awarded costs the plaintiffs are not authorized to tax and enter them in the judgment.

Herkimer Special Term, September, 1873.

MOTION to set aside so much of the judgment entered as awards costs to the plaintiffs, entered without any application to the court, and without any direction by the court or referee in regard to costs, and without notice of taxation.

This action was brought by Pliny Phelps and others, plaintiffs, against George W. Wood and others, defendants, claiming that plaintiffs and defendants, except defendant Wood, as heirs-at-law and next of kin of one Benjamin Phelps, deceased, were tenants in common with defendant Wood in a house and lot in Camden village; and that said defendant Wood had received the rents of said premises, and they (said plaintiffs and said other defendants) were entitled to one-half of said rents.

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The relief sought by this action was that defendant Wood account with plaintiffs and said other defendants, and pay over to them their shares of such rents.

The defendant Wood made answer, and the cause was referred to and tried before John F. Seymour, referee, who made his report, by which he found an amount due to each of said plaintiffs and said other defendants, from defendant Wood, the aggregate of which is \$125.50; and, as matters of law, found that said plaintiffs were entitled to receive and recover of defendant Wood the sum of twenty-five dollars and ten cents each, and said other defendants four dollars and eighteen cents each; but said referee did not, by his report, find or decide that said plaintiffs or any other party should recover costs in said suit.

Afterwards, and on the 12th day of April, 1873, Messrs. Adams & Swan, claiming to act as plaintiffs' attorneys, without any notice of application for judgment or any notice of taxation or adjustment of costs, entered a judgment upon said report, requiring said defendant Wood to pay said other defendants said sum of four dollars and eighteen cents each, and to said plaintiffs said sum of twenty-five dollars and ten cents each, aggregating the sum of \$125.50; and, also, that said plaintiffs recover of said defendant Wood the sum of \$167.03, plaintiffs' costs.

Defendant Wood, by this his motion, seeks to set aside said judgment upon the grounds,

1st. That no notice of taxation of said costs was ever served upon his attorney; and,

2d. That this suit being in equity, and costs in the discretion of the court, and no costs being allowed or given plaintiffs by said referee's report, plaintiffs were not entitled to recover costs.

GEORGE K. CARROLL, *attorney for defendant Wood.*

I. Defendant Wood having duly appeared and answered, was entitled to notice of all proceedings, including notice of

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taxation of costs, and plaintiffs having omitted to give such notice, the judgment is irregular and will be set aside on motion (*Elson* agt. *N. Y. Equitable Ins. Co.*, 2 *Code R.*, 30; 2 *Sandford*, 654; 4 *id.*, 684; 7 *How.*, 490; 2 *Code R.*, 49; 1 *id.*, 54).

Or, if the judgment should be allowed to stand, there must be a retaxation and readjustment at the expense of the plaintiffs, who should have given notice (4 *Sand.*, 684; 3 *How.*, 413; 20 *id.*, 215; 16 *Barb.*, 658; 17 *Abb. R.*, 37; 9 *How.*, 262; 18 *Abb.*, 14).

II. This was an equity suit; and the granting of costs to the prevailing party was in the discretion of the court; and no costs having been allowed by the court to the plaintiffs, costs were irregularly and improperly inserted in the judgment against the defendant Wood in favor of plaintiffs.

This was not one of the actions enumerated in section 304 of the Code, in which plaintiff is entitled to recover costs as of course; but, under section 306, the costs were in the discretion of the court.

The right to give or withhold costs rests in the discretion of the court (*Staiger* agt. *Shultz*, 3 *Keyes*, 614); and the question of granting or withholding costs was properly in the discretion of the referee (*Platt* agt. *Styles*, 17 *How.*, 211); and the referee's report not having granted costs to plaintiffs, costs were improperly included in the judgment entered in this action.

The judgment should be set aside, with costs of motion to defendant, Wood.

J. R. SWAN, Jr., *attorney for plaintiffs.*

This was an action brought under the provisions of section 9, page 39, 3d Revised Statutes, 5th ed., that "one joint tenant or tenant in common may maintain an *action of account*, or for money had and received, against his cotenants, for receiving more than his just proportion.

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I. The plaintiffs, having recovered more than fifty dollars, are entitled to costs, as a matter of course.

The defendants' counsel seems under the impression that an "action of account" and a "suit for accounting" are the same thing, which is an error.

An "action of account" is an action for moneys had and received upon the law side of the court.

Such an action will lie against a receiver for money had and received; also it will lie against a sheriff for money had and received; also it will lie against a bailiff for money had and received (*See forms of declarations in Humphrey's Precedents, for an action of account by one claimant against another, pp. 183 to 192*).

It is an action for money, not a suit for relief.

(a.) The act was passed giving this remedy to cotenants prior to 1813, when there was a distinction made between actions at law and suits in equity, and the words in the law an "action of account," *i. e.*, an action on the law side of the court.

(b.) If an action was brought against a receiver to account for moneys had and received, or against a sheriff or bailiff, could any question be raised that it was not an action for money?

(c.) As to the nature and law of "actions of account," see *Humphrey's Precedents*, 183 and 184; 3 *Hill's R.*, 59; *Roll. Abr.*, 116; 3 *Chitty*, 383; *Bacon's Abr., Account*; 3 *Taunt.*, 431; 19 *Wend.*, 121.

(d.) The Code provides, section 304, costs shall be allowed, of course, to the plaintiff upon a recovery in the following cases. * * * 4. In an action for the recovery of money where the plaintiff shall recover fifty dollars.

(e.) The only relief or judgment the court can give upon an "action of account" is a judgment for money. *Humphrey's Precedents* has the following form: "Therefore, it is considered that the said defendant recover against the said plaintiff the sum or balance of — dollars and — cents, and also *the costs*, as in common cases of judgment final for defendant."

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II. There is no motion here made for a retaxation of costs.

HARDIN, J. The summons in this action asks for relief. The complaint states the respective estates of the respective parties in the premises described in the complaint, and asks in its prayer for a recovery by the "plaintiffs, and all other persons who are tenants in common with defendant, Wood, in the proportions to which they are respectively entitled, and of the money and property received by Wood as the rents, issues and profits of said premises and interest thereon, * * * and for such other or further relief as to this court may seem meet, and that said defendant, Wood, be adjudged to pay the costs of this action."

The referee finds the sum of money secured by the defendant Wood, and then states the respective interests of the parties, as well plaintiffs as well as some of the defendants therein, and orders judgment accordingly.

The learned counsel for the plaintiffs insists that the plaintiffs are entitled to recover costs as of course in virtue of section 304 of the Code, and quotes subdivision 4 thereof in respect to "actions for the recovery of money."

In *Buchanan agt. Morrell* (13 How., 299), it was said that the nature of the action is to be determined by the allegations of the complaint and the relief it prays for (*See* § 275; *Davis agt. Landerston*, 56 Barb., 480).

By the Code, the distinction between legal and equitable remedies is abolished, and a uniform course of proceeding established. See preamble of the Code of 1848, and section 1 of said act, and if a party entitles himself to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled (*Emery agt. Pease*, 20 N. Y., 62; 30 Barb., 9; 40 N. Y., 504).

The amount due in this case to each tenant or cotenant with Wood is a debt due severally to such tenant, not a

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joint debt or demand. If this action be not regarded as an action for an accounting, and an action in equity, how can a judgment be upheld which awards to the several cotenants their several and respective rights (*Hall agt. Fisher*, 20 *Barb.*, 466, 467)?

But the plaintiffs' counsel asserts that the old action "of account as for money had and received" is given by the ninth section of the Revised Statutes, third volume, fifth edition, page 39.

True, that statute authorizes an action for money had and received by a tenant in common against his cotenant to render his just proportion, but the Code controls as to the form of action; besides, the complaint in this action with its prayer comes short of the old action "of account."

The history of that action is given *McNary agt. Rawson* (3 *Hill*, 60). BRONSON, J., in that case, declares the remedy obsolete. There is less need for that form of action now that legal and equitable remedies are blended and may be had in the same court.

Assuming, therefore, that this action was not solely and specially an action for the recovery of money, and that it must be classed as an equity action in order to give effect to the scope of the complaint and its prayer, the conclusion follows that the costs were within the discretion of the referee, and inasmuch as he has not awarded costs the plaintiffs were not authorized to tax and enter them in the judgment (*Staiger agt. Shultz*, 3 *Keyes*, 614; *Pratt agt. Styles*, 17 *How.*, 211; *Code*, § 306).

The motion must be granted without costs, as the question is novel, and without prejudice to the rights of the plaintiffs to move for directions to the referee to pass upon the question of costs.

The defendant upon serving a copy of this opinion and a proposed order may have the order settled upon two days' notice.

In the Matter of Norton agt. Dowling.

N. Y. SUPERIOR COURT.

IN THE MATTER OF THE APPLICATION OF JOHN NORTON FOR A
WRIT OF PROHIBITION agt. JOSEPH DOWLING *et al.*

Writ of prohibition may issue out of the superior court of the city of New York to restrain an inferior court.

The convention or board of police justices of New York, organized under the act of 1860, in appointing and removing clerks, does not act as a court to be restrained, nor their proceedings reviewed by writ of prohibition.

Special Term, September, 1873.

VAN VORST, J.—By the act of the legislature, passed April 17, 1860, entitled “An act in relation to police and courts in the city of New York,” provision is made, among other things, for the organization of the police justices in *convention*; the convention to be known as “the Board of Police Justices of the City of New York.”

By the act various duties were cast upon the board with respect to the preparation and preservation of statistics of the various police courts, and of filing and preserving such resolutions as they might from time to time approve for the better maintenance of morals and order in the city.

By section 28 of the act it is provided that any clerk mentioned in the act, except the clerk of the court of special sessions, may be removed, for cause, by said board of police justices; but that no such removal shall be made without the concurrence of six members of said board, and on complaint of the justice or justices who appointed such clerk, nor until such clerk shall have had an opportunity to be heard in his defense.

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The papers show that, on the 21st of August, 1873, at a meeting of the board of police justices, at which six of the justices (being a majority of the board) were present, justice Cox presented certain specifications charging assistant clerk John Norton, of the second district police court, with neglect of duty; the specification being that from July 1, 1870, to July 31, 1873, Norton, without permission or authority, absented himself from the court continuously, and failed and neglected to perform the duties assigned to him as such clerk.

It was ordered by the board that their clerk serve a copy of the charges on Norton, with notice that the board would meet on Tuesday, August 26, 1873, at one o'clock P. M., to hear any defense that Norton might make to the charge.

The board then adjourned until August 26, at one o'clock. On the 26th of August the board again assembled, all the justices being present except justice BIXBY.

Norton appeared with his counsel in obedience to the notification, and interposed a preliminary objection to proceeding, on the ground that all the police justices were not present. At the request of the counsel of Norton the proceedings were laid over until the next meeting. At the next meeting of the board, held on the second of September, all the justices were present, and the minutes of the preceding meeting were approved; but nothing was done in the investigation of the charges; Norton having, in the interim, since the last meeting, applied for and obtained from this court a writ of prohibition, restraining the justices from any further proceeding in the matter, together with an order to show cause why the restraint should not be absolute. The process was directed to all the justices composing the board, except justice BIXBY, and was served upon them on the second of September, and restrained the action of the board in the premises.

On the return day of the order to show cause, it was objected by the counsel for the board that this court was not authorized to issue a writ of prohibition; that such process

In the Matter of Norton agt. Dowling.

could only proceed from the supreme court. By the act of the legislature of April 17, 1873, it was declared that the superior court of the city of New York "has henceforth original jurisdiction, at law and in equity, concurrent and coextensive with the supreme court, of all civil actions and of all special proceedings of a civil nature."

This would include authority to issue a writ of prohibition in a proper case; but I am of opinion that neither the board of police justices nor its members may be restrained by writ of prohibition from the performance of duties imposed by law.

It may well be questioned whether "the Board of Police Justices" acts as a *court* in the discharge of the special duties imposed upon it by the act of the legislature of 1860, above referred to.

The writ of prohibition, issuing out of a superior court, is directed to the judges of an inferior court, or the parties to a suit therein, or both conjointly; the object of the writ being the keeping of the *court* to which it is directed within its proper jurisdiction, or to repress the assumption of authority by any pretended court (*Broome's Comm. on the Common Law*, p. 232, and cases cited).

By the Revised Statutes of this state it is provided that the writ of prohibition shall command the *court*, or *party* to whom it shall be directed, to desist and refrain from any further proceedings (*Statutes at Large*, vol. 2, p. 609).

The *party* referred to in the statute is the person who is acting adversely to the applicant for the writ in the inferior court. In *The People agt. Supervisors of Queens* (1 Hill, 201) it is stated that "the writ of prohibition is directed to a *court* in which some action or legal proceeding is pending, and to the *party* who prosecutes the suit."

The "convention" or board of police justices, in collecting and preserving statistics, in passing resolutions for the good order of the city, and in appointing and removing clerks, does not act as a court, within the meaning of the statute, to be restrained by writ of prohibition.

In the Matter of Norton agt. Dowling.

Kindred duties are often cast by law upon individuals and boards having no connection with courts established for the administration of justice. But in any event it is evident that, in proceeding against Norton, the board is clearly acting within its jurisdiction, and the scope of duties imposed upon it by the act of the legislature in question.

It is objected, however, by the applicant that it does not appear that all the justices were notified of the meeting at which the charges and specifications were to be considered. That all the members should be present or notified to be present.

It does not appear but that the member absent from the meeting of August 26 had been notified to attend. This, as appears by the minutes, was a meeting regularly adjourned from the previous meeting of August 21. The time for this hearing had been fixed by the previous meeting of the board, and was a matter of record within the reach of all the members. All the members would be presumed to have notice of the regular meetings of the board, especially when so formally appointed, and it would be their duty to attend.

To rebut this presumption affirmative evidence should have been given. Under such circumstances the absence of one member would not prevent the others from acting. But on the day named for the actual hearing of the matter, the second September, when the writ of prohibition was served, all the members, as appears by the minutes, were assembled.

In no event, therefore, is this a proper case for the intervention of this court, through the restraining power of its writ of prohibition; nor can the applicant be removed without the concurrence of six members of the board.

The board having jurisdiction of the subject-matter, errors in the proceedings, if any, are subject to review by another remedy.

The board of police justices are authorized to proceed in the matter in question, and a writ of consultation is awarded.

Schell agt. Plumb.

SUPREME COURT.

EVA SCHELL agt. ISAAC PLUMB *et al.*, Executors, &c.

In an action to recover damages for the breach of a contract to support the plaintiff during her life, *prospective damages* may be allowed, and the introduction as evidence of the Northampton tables, to show the probabilities of the plaintiff's life, is proper on that point.

It is proper to show that a witness has made a statement inconsistent and irreconcilable with the *facts* to which he has *testified*. And if he denies that he has made any such statement, then to show that he has. And it is immaterial whether it be a statement of fact or the expression of an opinion, if it be adverse to his testimony.

Third Department, Albany General Term, March, 1873.
Before MILLER, DANIELS and DANFORTH, JJ.

ACTION for damages for breach of contract to support plaintiff during life by defendants' testator.

The contract was made in Germany, in 1856, and was oral. The terms were that the plaintiff should pay over to the defendants' testator what money she then had, about \$300, German money, and what she might thereafter earn over and above the supply of her wants, and he should provide her a home and maintenance during her life. The breach alleged is the turning away of the plaintiff about the year 1870, but is proved to have occurred in the spring of 1869.

Peter Thomas, the defendants' testator, died February 4, 1870, and letters testamentary were issued to the defendants March 14, 1870.

The complaint alleges the making of contract, performance by the plaintiff, breach by the testator, death of the testator

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and appointment of the defendants as his personal representatives, and asks judgment for \$2,000 and costs.

The answer denies the making of the alleged contract, and alleges a willingness on the part of the defendants' testator to support the plaintiff, and that plaintiff left of her own accord, and also that her conduct was bad.

Trial before Mr. justice MURRAY and a jury, at the Chenango circuit, held May 30th, 1872, and a verdict rendered for plaintiff for \$1,000.

The defendants move for a new trial on a case and exceptions.

D. L. ATKYNS, *for the defendants, appellants.*

I. The question raised upon the whole case is important and, substantially, uncontrolled by precedent in this state, and, to my mind, the position that upon default in such a continuing contract entire damages, extending beyond the commencement of the action, may be assessed, is opposed to the current of authorities within and without the state. In 8 B., 412, it does not appear that any recovery was had beyond damages accrued at the time of bringing action (*vide* 35 Barb., 579), and the last case cited is principally as to the effect of the statute of frauds on such a contract. From the proposition that damages accruing after suit may be given, MORGAN, justice, dissents (*Dresser* agt. *Dresser*, 35 B., 578, 579). Hence I claim the doctrine of *stare decisis* is not in this case.

II. In the attempt to estimate future damages in a case like this, there is "insuperable difficulty (2 N. Y., 97; 35 Barb., 579); a difficulty which has compelled the courts to arbitrarily exclude, from the consideration of juries, damages depending upon uncertain conjecture and speculation as to the future operation of given causes or conditions.

(a.) Profits, as such, are not allowed as damages, unless they can be *definitely* ascertained by reference to established

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rates; although the loss of them necessarily result from breach of the contract. The chief reason for disallowance being "that they are too uncertain, and depend upon too many contingencies to be entitled to judicial sanction" (*Rhodes* agt. *Baird*, 16 *Ohio St.*, 573; *La Armistad, etc.*, 5 *Wheat.*, 389; *Griffin* agt. *Colver*, 16 *N. Y.*, 489; *Academy, etc.*, agt. *Hackett*, 2 *Hilt.*, 217).

The same rule should control in any other case, where it is impossible to apply any definite rule of damages with certainty and precision (5 *Lans.*, 524).

(b.) "Actual compensation should only be allowed for actual loss." This has grown into a maxim. A contrary rule is without equity. I submit that in this case this maxim has been subverted,—was given no application except in *theory*. If plaintiff lives twenty years, does this verdict compensate her? If she had died the day after the trial, what right had her estate to \$1,000 for an actual loss of \$325? (*Weller* agt. *Eumes*, 2 *Am. Rpts.*, 150, and cases cited; *Gilbert* agt. *Winan*, 1 *Comst.*, 550; *Aberdeen* agt. *Blackman*, 6 *Hill*, 324; *Hayes* agt. *Moynihan*, 52 *Ill.*, 423).

III. The defendants should not suffer because plaintiff has brought her action in a form which renders an estimate of her damages impossible. Her remedy was adequate in equity. She could have compelled a literal performance, or got its yearly worth in money. This would be just to all. The verdict is totally unjust, because by no human power can it be known whether it is compensation or robbery.

The very ancient rule of allowing juries to guess at and conjecture damages in actions on contract is substantially overruled. The courts now seek to find a measure which can definitely appear from the terms of the contract, or from opinions of competent persons, as to values, or market rates, the legal measure being declared by the court. And arbitrary rules have been established in cases possessing the same uncertainty as this, and where before were only guess, conjecture and uncertainty (*Rhodes* agt. *Baird*, 16 *Ohio St.*, 573;

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Taylor agt. *Bradley*, 39 *N. Y.*, 129; *Dexter* agt. *Manley*, 4 *Cush.*, 15).

IV. *Shaffer* agt. *Lee* (8 *B.*, 412), from all that appears, needed to decide only that the plaintiff could recover the ascertained damages up to the time of suit. Much of the opinion is *obiter dictum*; and very clearly the declaration, that only one action would lie, that one recovery ended the contract, and final damages must be assessed, is contrary to the authorities (62 *Barb.*, 482).

I submit, that this was a continuing contract; that the deceased could not terminate it alone, and that successive actions could be brought thereon by the plaintiff, *toties quoties*, in which by fixed and certain rules she could have recovered "actual compensation for actual loss" (*McConnell* agt. *Kibbe*, 33 *Ill.*, 175; *Ind. C. R. R.* agt. *Moore*, 23 *Ind.*, 14; *Berry* agt. *Harris*, 43 *N. H.*, 376; *Remilee* agt. *Hall*, 31 *Vt.*, 582; *Wetmore* agt. *Aldrich*, 10 *Mich.*, 515; *Stuyvesant* agt. *Major*, 11 *Paige*, 414; *Hambleton* agt. *Vere*, 2 *Saund.*, 169, 337; *Cook* agt. *Whorwood*, 2 *Burr.*, 1087; 10 *Coke*, 116; *Rudder* agt. *Price*, 1 *H. Bl.*, 550; *Lewis* agt. *Peachy*, 1 *H. & C.*, 518; *Stone* agt. *Rogers*, 2 *M. & W.*, 443; *Bleecker* agt. *Smith*, 13 *Wend.*, 530; *Warner* agt. *Bacon*, 8 *Gray*, 397; *Hart* agt. *Hart*, 14 *How.*, 418; *Woodbury* agt. *Duval*, 15 *Ind.*, 160; *Church, etc.*, agt. *Brown*, 54 *Barb.*, 191; *Shadwell* agt. *Shadwell*, 9 *C. B., N. S.*, 159; *Atwood* agt. *Norton*, 27 *Barb.*, 638; *Vide Beach* agt. *Crain*, 2 *Comst.*, 86).

And because successive actions may be brought, no damages are allowed accruing after suit. This principle applied to this case would give compensation and no more (*See 2 Cow. Tr.*, 1011, 2 *ed.*, and cases cited; *Holmes* agt. *Wilson*, 10 *A. & E.*, 503; *Beckwith* agt. *Griswold*, 29 *Barb.*, 291).

With deference to the learned justice sitting at circuit, I think he erred in holding that plaintiff could recover final damages, as for a total breach, and that for such error a new trial must be granted.

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V. An action for damages in cases of this kind affords no remedy, just or adequate, to plaintiff or defendant, unless held to be a continuing contract, with the right to successive actions *toties quoties*. And the courts, declaring that no proper measure of entire damages can be applied, have in several cases decided that, for this reason, they will not allow one party to such a contract to terminate it, but will compel the performance thereof by the exercise of equitable power, a remedy perfectly just, and which should exclude the attempt at impossible compensation by guessing at damages (*Rhodes* agt. *Rhodes*, 3 *Sandf. Ch.*, 279; *Marsh* agt. *Blackman*, 50 *Barb.*, 329; *Chubb* agt. *Peckham*, 2 *Beas. [N. J.]*, 207; *Sullivan* agt. *Tuck*, 1 *Md. Ch.*, 59; *Buxton* agt. *Lister*, 3 *Atkyns*, 385; *Ball* agt. *Coggs*, 1 *Bro. P. C.*, 140; *Adderly* agt. *Dixon*, 1 *Sim. & Stu.*, 607; *Davis* agt. *Hone*, 2 *Sch. & Lef.*, 341; 1 *Chit., Gen. Pr.*, 854; *Pegge* agt. *Lampeter*, 2 *Moak Eng. R.*, 669).

VI. The justice at circuit erred in submitting to, and charging, the jury that they might decide how long the plaintiff would live; how much it would probably cost her to support herself through life, and in admitting the Northampton tables as evidence of her chances of life (*Morgan, jus.*, 35 *Barb.*, 579).

(a.) They were hearsay; and we were deprived of the benefits of cross-examining as to accuracy of the estimates .

(b.) Living witnesses could have been produced, who had made the subject a study.

(c.) No judicial notice could be taken of those tables. They are only of private authority.

(d.) Upon no principle are they evidence on a contested question of private rights (*Darby* agt. *Ouseley*, 36 *Eng. L. & Eq.*, 518).

(e.) The following cases exclude such private-productions from evidence, and show the principles which must also exclude these tables (1. *Bank Note Detectors not admissible: Payson* agt. *Everett*, 12 *Minn.*, 216; 2. *Nor newspaper quo-*

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tations of the value of gold: 5 *Robt.*, 124; 3. *Nor Youatt's Treatise: Fowler* agt. *Lewis*, 25 *Tex.*, 380; 4. *Nor Veterinary or Medical Works: Washburn* agt. *Cuddily*, 8 *Gray*, 430; *Yoe* agt. *State*, 49 *Ill.*, 410; 5 *C. & P.*, 73; 3 *Bos.*, 7; 5. *Nor almanac to prove time of sunrise: Tutton* agt. *Darke*, 5 *Hurl. & Nor.*, 647; 6. *Nor work on Popery, to prove bulls, canons, &c.: Darby* agt. *Ouseley*, 36 *Eng. L. & Eq.*, 518; 7. *Nor Army Rules*, 4 *B. & C.*, 292; 8. *Nor Log Book: U. S.* agt. *Gilbert*, 3 *Sum. R.*, 70; 9. *Nor Lloyd's Reg. Ship'g: 5 C. & P.*, 475; 10. *Such works may not be used as evidence of any fact in issue as to private rights: See a strong and thoroughly considered case, Darby* agt. *Ouseley, supra*.

(f.) As well use Malthus to prove geometrical ratio of increase in population, or Darwin as evidence of the gradations from monkey to man.

VII. From Metler's testimony the jury might have found (indeed such is the evidence) that this was a contract for personal care and attention in the "home and family" of deceased, which would terminate upon his death, and the death of his family. The refusal so to charge was error (14 *How.*, 418; 8 *Barb.*, 557; 25 *Conn.*, 530; 10 *Allen*, 85; 7 *R. I.*, 589; 1 *Hill*, 580; 21 *Wis.*, 395; *Rollins* agt. *Riley*, 44 *N. H.*, 9).

VIII. From the evidence of plaintiff and Robinson, it appears that she had worked and had her board since leaving Thomas. No charge was made for work or board. It must be presumed from the evidence that the one paid for the other. She was bound to earn her board, if able. She done so up to the trial. There was nothing to submit to the jury as to the difference between the *actual* value of her service and her board. It was a "proposition without evidence" (*Noakes* agt. *People*, 25 *N. Y.*, 380, 540; *Storey* agt. *Brennan*, 15 *N. Y.*, 524; *Gale* agt. *Wells*, 12 *Barb.*, 84; *Chirac* agt. *Reinecker*, 2 *Pet.*, 613).

IX. Jacob Harris, husband of one of the defendants, was a witness for defendants. He testified to certain *material facts*,

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to wit: contradicted the plaintiff and Metler as to amount of money had by Thomas of plaintiff, in Germany; as to use of it; testified to a conversation with plaintiff and Thomas, from which the fair inference is that no bargain was made by Thomas to support plaintiff, but that Thomas gave her a home as long as she behaved well; testified to conduct on plaintiff's part which would justify Thomas in refusing to keep her longer, and to freaks of passion which had a strong tendency to confirm, and did confirm, the evidence of Ellen Harris, that plaintiff went voluntarily away.

And upon the question of damages, testified that plaintiff could earn her board and clothes, while plaintiff's witnesses said she would fail of that \$100 a year.

His credit was destroyed as a witness, by cross-examination as to immaterial matter, an opinion, and upon his denial, contradicting him.

(a.) The question, whether Harris had said plaintiff ought to have \$1,000, was immaterial to the issue. He *admitted* ill-feelings towards plaintiff. He testified to no opinion. *None would have been proper.* He testified to certain material *facts*. He was discredited, not by proof of any different statement of any fact, but by proof that he had expressed an opinion out of court, upon the whole merits, or amount plaintiff should recover, *without reference to the facts on which such recovery depended* (Elton agt. Larkins, 5 Car. & Pay., 385; Holmes agt. Anderson, 18 Barb., 420; City Bank agt. Young, 43 N. Hamp., 457; Lane agt. Bryant, 9 Gray [Mass.], 245; Hubbell agt. Bissell, 2 Allen [Mass.], 196; Rucker agt. Beatty, 3 Ind. [Port.], 70).

13 N. Y., 268, does not conflict with these cases. Stebbins had given an opinion. His opinion was contradicted by what he had before said.

(b.) Plaintiff having cross-examined Harris as to immaterial matter was bound by his answer (Winton agt. Meeker, 25 Conn., 456; Fletcher agt. Boston, &c., 1 Allen [Mass.], 9; Carpenter agt. Ward, 30 N. Y., 243; Plato agt. Reynolds, 27 N.

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Y., 586; *State* agt. *Staley*, 14 *Minn.*, 105; 45 *N. Y.*, 125).

(c.) The question to Harris, as to what he said to Robinson, was immaterial to the issue. The test of immateriality is held to be: "If the answer of a witness is a matter which the cross-examining party would be allowed to prove on his part, in evidence; if it have such a connection with the issue, that such party would be allowed to give it in evidence, then it is a matter in which the witness may be contradicted" *Pollock*, *C. B.*, *Att'y-Gen.*, agt. *Hitchcock*, 1 *Exch. R.*, 91, 99; *Combs* agt. *Winchester*, 39 *N. Hamp.*, 13; 2 *Phil. Ev.*, 969, 970, ed. 1859).

In 39 *N. H.* (*supra*), the same test is adopted, adding: "if a question which could be put by party calling."

X. Under these exceptions (*Code*, § 265; 31 *Barb.*, 171; 38 *B.*, 117) such errors in admission of evidence cannot be disregarded. It may, it did hurt the defense (*Sprague* agt. *Cadwell*, 12 *Barb.*, 516; *Worrall* agt. *Parmelee*, 1 *Comst.*, 519; *Williams* agt. *Fitch*, 18 *N. Y.*, 546; *Brown* agt. *Richardson*, 20 *id.*, 476; *Erben* agt. *Lorillard*, 19 *id.*, 299; *Weber* agt. *Kingsland*, 8 *Bos.*, 415, 441; *Hahn* agt. *Van Doren*, 1 *E. D. Smith*, 411; 31 *How.*, 372; 46 *N. Y.*, 235).

The rule upon a case has no application.

It is respectfully submitted that manifest errors crept in, in the haste of the trial at circuit, to the prejudice of the defendants. A new trial should be granted, with costs.

HOLDEN & FULLER, for plaintiff, respondent.

I. An action for entire damages can be maintained for breach of contract to support a person during life (*Dresser* agt. *Dresser*, 35 *Barb.*, 573; *Shaffer* agt. *Lee*, 8 *id.*, 412; *Royalton* agt. *R. & W. Turnpike Co.*, 14 *Vt.*, 311; *Fish* agt. *Falley*, 6 *Hill*, 54; *Masterton* agt. *Mayor of Brooklyn*, 7 *id.*, 61; *Greene* agt. *West Cheshire Railway Co.*, 1 *Moak, Eng.*, 546).

II. There was a preponderance of evidence in favor of the

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plaintiff upon all points, and every question was fairly submitted to the jury.

III. The evidence of the value of plaintiff's support for the last three years was properly admitted, no objection being taken to the competency of the witnesses.

IV. The Northampton tables were properly admitted to aid the jury in assessing damages. The objection was only to materiality and competency. The use of those tables for such a purpose has become a part of the law (*Grier* agt. *Mayor of New York*, 1 *Abb.* [N. S.], 206; *Wager* agt. *Schuyler*, 1 *Wend.*, 553; *Guthrie* agt. *Pugsley*, 12 *John.*, 126; *Jackson* agt. *Edwards*, 7 *Paige*, 386, 408; 68 *Penn. St.*, 400; 59 *Maine*, 488; see *Rule* 85, *supreme court*).

V. The evidence of Lysander Robinson to discredit Jacob Harris was properly received. Harris, in his direct examination, had testified that the plaintiff told him soon after she came to this country that she had not any property, and that Peter told her that when she behaved herself she could stay; that she had but \$105, German, at sixty-five cents each, and out of that Peter had paid for her cow twenty-eight dollars, and six years' interest, and her passage over; and that her temper and conduct were very bad; and that her ability to labor was about as good as it had been for fifteen years.

On cross-examination Harris swore that he had been married to defendant Ellen one year and two months; and that he did not tell Robinson, the spring or summer after Peter died, that the plaintiff ought to have \$1,000 out of Peter's estate. The evidence of Robinson was material as affecting the credibility of Harris, and related to the same matter which Harris testified about on his direct examination, and showed that his mind had been changed upon his marriage with Ellen.

It is not as if Harris had been asked about a transaction affecting his character. It shows what his mind had been upon the very transaction about which he testified on his direct examination. "The moral effect of the evidence

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would operate on a reasonable mind with considerable force."

It was received for the sole purpose of contradiction (*Patchin* agt. *Astor Mut. Ins. Co.*, 13 *N. Y.*, 268; *Gandolfo* agt. *Appleton*, 40 *id.*, 533; *Chapman* agt. *Brooks*, 31 *id.*, 75; *Fleet* agt. *Murton*, 1 *Moak, Eng.*, 32, 36, 37).

VI. The objection to the question put to Robinson was insufficient, there being no suggestion that the evidence was incompetent as being an opinion (*Atkins* agt. *Elwell*, 45 *N. Y.*, 753).

VII. The relation of witness to parties and subject-matter of suit has always been held material (*Newton* agt. *Harris*, 2 *Selden*, 345; *Slocum* agt. *Cent. R. R. Co.*, 45 *N. Y.*, 125; *Starks* agt. *People*, 5 *Den.*, 106).

VIII. The party who alleges error in an appellate court must show it specifically (*Bryant* agt. *Trimmer*, 47 *N. Y.*, 96; *Baptist Ch.* agt. *Brooklyn Fire Ins. Co.*, 28 *id.*, 153).

IX. The charge was in all respects correct.

1st. A correct rule of damages was laid down.

2d. The jury were properly instructed in the use of the tables.

3d. The amount of the property of the deceased was not in issue.

4th. If any contract was proved, it was to support plaintiff during life.

5th. If the contract was valid and not broken the plaintiff was a part of Peter Thomas' family, and as long as she lived, and the case supposed of his death would leave his family still in existence.

6th. The request of defendant should have been limited by inserting the words "and not elsewhere or otherwise" after the word "deceased" (*Carpenter* agt. *Stillwell*, 1 *Kern.*, 61; *Hodges* agt. *Cooper*, 43 *N. Y.*, 216).

X. Motion for nonsuit was properly denied.

XI. A new trial cannot be asked on grounds not taken at the trial (*Hubbard* agt. *Russell*, 24 *Barb.*, 404; *Gelston* agt. *Hoyt*, 13 *Johns.*, 577; *Abernethy* agt. *The Society of the Ch.*

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of the Puritans, 3 *Daly*, 1; *Paige* agt. *Fazackerly*, 36 *Barb.*, 392; *Rue* agt. *Perry*, 41 *How.*, 385).

The motion for a new trial should be denied.

By the Court, MILLER, P. J.—This action was brought for damages sustained by a breach of a contract made by the defendant's testator in his life for the support of the plaintiff.

The main question to be determined is, whether an action for entire damages can be maintained for a breach of a contract of this character.

While the question is not entirely free from embarrassment, and there are difficulties in many cases in recovering for prospective damages, yet the rule is well settled that such damages may be allowed. In actions for personal injuries occasioned by another, such damages frequently constitute no inconsiderable portion of the amount to be recovered, and must be estimated somewhat upon evidence which forms no very certain basis for accurate and careful calculation. More reliable and satisfactory evidence is furnished in the case at bar than is usually presented, and I am unable to discover any valid reason why the plaintiff could not recover one entire amount instead of being compelled to bring separate actions from time to time for separate and distinct breaches of the contract, thus causing a multiplicity of suits, which it is the policy of the law to discourage. The value of the support of an aged person is not difficult to estimate, and in accordance with well established rules, which the courts have sanctioned, the value of the life itself can, without much difficulty, be computed.

With evidence tending to show both these essential elements of the plaintiff's right to a recovery of damages, I do not think that it can be fairly claimed that the damages recovered in this case are so uncertain, speculative and conjectural as to be beyond any recognized rule of law.

In *Shaffer* agt. *Lee* (8 *Barb.*, 412) an action was brought upon a bond to furnish to the obligee and his wife a support

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during their lives, and was held that it was an entire contract; that a failure by the obligor to provide for the obligee and his wife, according to the substance and spirit of the covenant, amounted to a total breach, and that full damages might be recovered for the future as well as the past. The learned judge who wrote the opinion in the case last cited remarks that where the neglect or misconduct of the defendant is such that the plaintiff may consider it a total breach, entire damages may be recovered.

The distinct question now considered was presented upon the trial, and it is an authority directly in point (*See also Dresser agt. Dresser*, 35 *Barb.*, 373).

There was no error, I think, in introducing the Northampton tables as evidence, and of reading from them so much as showed the probabilities of life of a person of the age of plaintiff. These tables are used for the information and guidance of courts of justice in determining the probabilities of human life and the value thereof, and furnished to the jury some information which rendered material aid in forming a conclusion as to the amount of damages in the plaintiff's case.

They are the result of careful inquiry and the closest calculations of experienced men, which have been adopted by the courts as the most accurate means of estimating the moneyed value of lives, and I see no objection to their introduction as testimony.

The evidence of Robinson to contradict Harris was, I think, properly received. Harris' testimony tended to contradict the plaintiff's evidence as to certain facts, and on cross-examination he denied that he had said that the plaintiff ought to have \$1,000 out of the estate of the testator. Such a declaration would have been inconsistent with the testimony which he had given, and I think it was competent to contradict him in this respect by showing that he had made such a statement.

Upon principle, without reference to authority, it seems to me it is very clear that it is proper to show that a witness has

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made a statement inconsistent and irreconcilable with the facts to which he testifies; and if he denies that he has made any such statement, then to show that he has. And it matters not whether it be a statement of fact or the expression of an opinion, if it be adverse to the story which he has narrated. If it be opinion in direct conflict with his evidence it would clearly tend to impair the credit of the witness to some extent, and in many cases as much perhaps as if it was a fact. I think the judge properly refused to charge as requested, that if the contract was to provide the plaintiff with a home in the family of the deceased, his death terminated the liability. The purport of the contract, if any was made, was to support the plaintiff during her life, and the general character of the evidence was to that effect. And even if it had been confined to his own family, as it was for the life of the plaintiff, I think that the testator's death would not terminate the obligation.

There was no error in the charge or in any of the rulings upon the trial, and judgment must be ordered on the verdict for the plaintiff, with costs.

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N. Y. SUPERIOR COURT.

FREDERICK HOEFT and others agt. EDMUND B. SEAMAN and
JAMES M. THOMPSON.

The *Commissioners of the Department of Docks* of the city of New York have authority by statute to give a written permit to a person to use the side of a *pier* in the city and the water adjacent thereto, for a *floating bath*, to carry on the business of a bathing establishment, during the pleasure of the board, with the consent of the lessee of the pier.

The act of 1871 provides that the powers and duties therein conferred upon the dock commissioners shall not affect the powers of the *harbor-masters* as now defined by law. But the powers and duties of these several officials, as defined by statute, are wholly distinct and separate.

The harbor-masters have no power to remove such floating bath without its being established either that it is an essential interference with *navigation*, or that a necessity exists for its *immediate* use for the purposes of commerce. Until one or both of these questions of fact are determined, the owner of the bath will be protected in his lawful possession by *injunction*.

Argued July, decided October, 1873.

MOTION to continue an injunction.

The plaintiffs are the owners of a floating bath, known as Hoeft's bath, which is now, and for the last eight years has been moored in the waters of the East river, adjacent to and immediately south of pier No. 55 East river, and is fastened to the pier.

In May, 1873, the commissioners of the department of docks gave the plaintiffs a written permit to use the lower or southerly side of the pier, and the water adjacent thereto, for the business of a bathing establishment during the pleasure of the board.

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The pier is leased (by whom it does not appear) to one Quimby, who has consented to the use of the pier and slip by the plaintiffs.

The defendant Seaman is captain of the port, and the defendant Thompson one of the harbor-masters of the city of New York, who, it is alleged, acting under the direction of the captain of the port, has ordered the removal of the bath; and has threatened to use the necessary force to remove the same, if it is not removed by the plaintiffs.

Upon these facts a temporary injunction was granted, restraining the defendants from interfering; with an order to show cause why the injunction should not be made permanent.

The defendants, upon the return of the order, alleged that the bath-house obstructed the use of the waters of the river for the purposes of commerce; and that, acting under authority of law, they had directed its removal.

It was not alleged that, at the time the order for removal was given, there was any *impending* necessity for it; or that there was any application for the immediate use of the slip by ships or other vessels, or for any other commercial purpose; the allegation in that regard being that the vicinity of such pier has been the point or place where large quantities of marble, imported from Italy and other foreign countries, have been discharged; and that there is no other so suitable a place for its discharge. But it is not alleged that there was any occasion for its *immediate or present* use for any purpose connected with the commerce of the river.

The bath-house occupies a space in the waters of the river of 110 by 70 feet; and one end of the structure extends beyond the bulk-head some thirty feet.

ALBERT MATHEWS, *for plaintiffs*.

First. The *plaintiffs* are in *possession* of the premises, and it is incumbent on the defendants (in order to justify their

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attempted interference) to show some *legal authority* to control the plaintiffs' possession. The *defendants* do not claim as representing *the people* or *the public*, but solely as "*harbor-masters*" with restricted statutory powers. Even if it were conceded that this bath-house is a "*public nuisance*," still the *defendants* have no power to remove it unless in discharge of their *duties* (*F. P. Bridge Co. agt. Smith*, 30 *N. Y. R.*, 62.)

Second. The plaintiffs' right and title to *possession* is derived by strict legal authority as *sublessees* of the owner of the *locus in quo*, viz., the corporation of the city of New York, fortified by authority derived from the legislature of the state.

I. Pier No. 55 and its *rights*, easements and appurtenances are now leased to *Ezra Quimby*.

II. *Ezra Quimby* has *sublet* the portion thereof occupied by plaintiffs to them, and they pay him an annual rental of \$900 for the privilege.

III. In addition to this, the plaintiffs have the "*permit*" so to use and occupy the premises from the "*commissioners of the department of docks in the city of New York*," who derive their *powers* directly from the legislature of the state.

Third. The whole subject-matter of the *regulation and control* of the use of the "*wharf property*" in question where this *bath-house* lies is under the *exclusive jurisdiction* of the common council of the city and these *dock commissioners*, appointed under the state authority (*Act of April 5, 1870, vol. 1, p. 390, § 21, sub. 22, and § 99; act of April 19, 1871, vol. 2, p. 1235, § 6, sub. secs. 2 and 12; act of May 16, 1872, vol. 2, p. 1784, chap. 738*).

I. This "*wharf, pier and dock*," and its appurtenances and easements, and waters adjacent thereto, are the *private property of the city of New York*.

II. The "*commissioners of the department of public docks*" are *officers* appointed by the mayor of the city of New York under legislative authority.

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III. These "*commissioners*" have "*exclusive charge and control*" * * "*of all the wharf property belonging to the city of New York,*" * * "*including all the wharves, piers, bulk-heads and structures thereon and waters adjacent thereto, and all slips, basins, docks, water fronts, lands under water and structures thereon, and the appurtenances, easements,*" etc., etc. (*Act of 1870, vol. 1, p. 90, §§ 32, 38 and 43; act of 1871, vol. 2, p. 1235, § 6, sub. secs. 2 and 12*).

IV. The common council alone can interfere in respect to the use of the slips occupied by the plaintiffs (*Act of 1870, chap. 137, § 21, sub. 22; Vandewater agt. The City of New York, 2 Sand. Rep., 258*). By section 21, subdivision 22, they have power to pass ordinances "in relation to the construction, repair, care and use of docks, wharves, piers and slips" (*Mayor, etc., agt. Ryan, 2 E. D. Smith, p., 368*).

Fourth. The defendants have no right, power, authority or control over the plaintiffs or their "*floating bath-house*." It lies *harmlessly* within one of the "*wharves, docks or slips,*" which belong to the mayor, aldermen and commonalty of the city of New York, under its ancient charters, as its *private property*. The city corporation has also *exclusive jurisdiction* in the premises in every respect, *under its charter*, as part of its *sovereign prerogative*, and under the *police power* over the slip (as a public way) remitted to it by the legislature of the state, *except* so far as by express enactment the state may have lawfully *resumed* the sovereign power and control over the city's water rights by some explicit *police regulations* conferred upon other parties.

I. The "*harbor-masters for the port of New York*" are *state officers* appointed by the governor (*Act of May 22, 1862, p. 978, chap. 487, § 1*).

II. Their powers and duties respecting "*piers, wharves and slips*" in the city of New York are valid only as required by the necessities of the marine commerce of the city. The act creating them (*even as respects those wharves and slips which are the property of private citizens*) is con-

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stitutional and valid *only* so far as it is necessary as a *police regulation of the subject-matter not otherwise provided for* (Act of May 22, 1862, chap. 487, § 7; *Vanderbilt agt. Adams*, 7 *Cowen Rep.*, 750).

III. The act *defining* their powers (and repealing all other acts) *only* authorizes them to provide and assign suitable accommodations for all "*ships and vessels*" (and to regulate *them* in the stations *they* are to occupy at the wharves and in the stream), and remove such as are not employed *in receiving and discharging their cargoes, to make room for such others as require accommodation to receive or discharge their cargoes*" (Act of 1862, § 7). It does not purport to give the harbor-masters further police power, or to give them power to intermeddle with the use to which the corporation (through its department of docks) has devoted the waters in question for *sanitary purposes for the benefit of the public*, by the license granted to the plaintiffs.

IV. The act in question (granting power to the harbor-masters) must be strictly construed, so far as its letter would purport to interfere with the *private vested rights*, or the *sovereign authority*, or the previously granted or habitually exercised *police power* of the city in respect to its "*wharf property*" and *franchises*; or to oust it of its power to *exclusive control* in the premises, under its charter and the acts of the legislature.

The *constitution of the state* protects the city against such interference as respects its *vested rights* and authority (*Benson agt. The Mayor, &c.*, 10 *Barb. R.*, 323; *Roosevelt agt. Godard*, 52 *Barb. R.*, 550).

V. The acts creating the office and prescribing the powers and duties of "*dock commissioners*," and clothing the common council with *police power* (*Acts of 1870, 1871 and 1872, supra*), plainly show that the legislature had not intended (*by the act of 1862, supra*) to interfere with the rights and powers of the corporation to control the "*wharf property*" belonging to the city in such matters as are involved in

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the special use of the waters in question granted to the plaintiffs.

VI. The defendants do not represent the *public*, and are mere creatures of the statute.

Fifth. It is an old and well established rule in equity to grant an injunction to restrain a threatened injury like the present, involving, as it would, *irreparable injury and damages incapable of computation or compensation* by a legal action for damages. This injunction should therefore be granted *pendente lite* until the conflicting claims of authority can be definitely settled by the trial of the issues involved (2 *Story Eq. Jurisp.*, §§ 928, 929).

I. No harm can result to the defendants from granting the injunction, while its refusal subjects the plaintiffs to great and irreparable loss at the *season* most critical to the plaintiffs, and when the public interests served by them are chiefly involved.

HORACE M. HASTINGS, *for defendants*, relied chiefly on the statute giving power to the harbor commissioners, and citing the cases of *Adams agt. Farmer* (1 *E. D. Smith*, 589) and *Franklin agt. Pendleton* (3 *Seld.*, 508), to show that this bath-house was a "ship or vessel."

MONELL, *J.*—The space occupied by the plaintiffs for their bathing-house, under a "permit" or license from the commissioners of the department of docks, is a part of the navigable waters of the East river. It lies below the low water mark, and partly in the channel of the stream, and is used wholly for private emolument.

Such a use of a public navigable river would be a purpresture, or public nuisance, unless authorized by law. The ninety-ninth section of the act to reorganize the local government of the city of New York, as amended in 1871, declares that the department of docks shall have exclusive charge and control * * of all the wharf property belonging to the city, including all the wharves, piers, bulk-heads and struc-

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tures thereon, and waters adjacent thereto, and all the slips, basins, docks, water fronts, land under water, and the appurtenances, easements, uses, reversions and rights belonging thereto, which are now owned or possessed by the corporation. Such department also has the exclusive charge and control of the repairing, maintaining, leasing and protecting the property; and is invested with the exclusive government and regulation of all wharves, piers, bulk-heads and structures thereon, and waters adjacent thereto, and all the basins, slips and docks, with the land under water, in said city not owned by the corporation.

Under this most comprehensive and clearly defined authority in the dock commissioners over the dock property of the city, which extends, as will be seen, over the slips, basins, and adjacent waters, and includes as well property owned and not owned by the city, the power of the commissioners to grant leases and franchises, and to permit private uses of such slips, basins and adjacent waters, where such use does not essentially interfere with or obstruct the public use, cannot well be questioned.

All navigable streams belong to the public; and the state cannot grant them to any private use that will impair the public use. Congress, under its authority to regulate commerce, may, in furtherance of commerce, restrict, in some degree, the public use of navigable waters (*State of Penn. agt. Wheeling, &c., Bridge Co.*, 18 How., 421); but no such authority is reserved to the states (*Gilman agt. Philadelphia*, 3 Wall., 713). A grant of a monopoly of the Hudson river, given to Robert R. Livingston in 1798, was declared by the supreme court of the United States to have been unconstitutional, as infringing the exclusive power of congress to regulate commerce (*Gibbons agt. Ogden*, 9 Wheat., 1).

The authority of that case has since been uniformly recognized and followed; and grants by the state have been confined to such uses only as do not impede the public use. Hence, in grants for the erection of bridges or other struc-

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tures over or in navigable streams or waters, provision must be made for their construction in such manner as not essentially to obstruct the common free navigation by the public (*People agt. Saratoga and Rens. R. R. Co.*, 15 *Wend.*, 113; *Penn. agt. Wheeling, &c., Bridge Co.*, 13 *How.*, 518; *Columbus, Mo., Co. agt. Peoria Bridge Co.*, 6 *McLean*, 70).

The act of the legislature creating the department of docks is valid, if no grant is made under it which will obstruct commerce. The commissioners may regulate the use of the basins and slips, and may permit them to be used for private purposes, provided such use does not essentially impair the public use. There are no riparian rights to adjacent waters, and the public can complain only when its use is obstructed.

In *Lansing agt. Smith* (4 *Wend.*, 1), involving the Albany pier question, the chancellor says (*p.* 21): "there can be no doubt of the right of the legislature to make grants when they do not interfere with the vested rights of individuals. The right to navigate public waters are public rights, and not the private, inalienable rights of each individual."

But should the department grant the exclusive private use of slips or basins to a degree that would essentially interfere with the rights of the public, it would be a purpresture, and indictable as a public nuisance (*People agt. Vanderbilt*, 26 *N. Y. R.*, 287; 28 *id.*, 396).

But, within the restrictions mentioned, the department, under the power to regulate the use of the slips and basins, may lawfully permit their use for a private purpose. In one case (*Hecker agt. Balance Dock*, 24 *Barb. R.*, 315) the court even held that the corporation might direct the use of any particular slip to be appropriated exclusively to any particular craft or class of vessels.

Without, however, concurring in this perhaps extreme view, it is sufficient if the appropriation to a private use does not essentially interfere with the use for commerce.

The test, therefore, of a legislative grant of power over navigable waters is whether it allows of any essential inter-

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ference with the public use; and that is always a question of fact, to be disposed of in the manner such questions are usually determined. If there is no such interference or obstruction of the public use, then a legislative grant of a private use is neither a purpresture nor a public nuisance.

Independently of this general principle, applicable to all navigable streams, the right and authority of the corporation to and over the wharves, piers, slips and basins, granted first by the ancient charters (*Montgomerie*, § 38), and since recognized and continued in all subsequent legislation, extend the jurisdiction of the city over much of the adjacent waters, which, at the present day, reach at least to the pier or bulk-head line (*People* agt. *Vanderbilt*, 26 *N. Y. R.*, 287).

It has not, I think, been doubted at any time that, within the space thus granted, the corporation has the most ample power to occupy and use it; and, as an incident or appurtenant, to grant to others the right to occupy and use it to any extent that does not at least obstruct the free navigation of the river. The construction of piers, slips and basins is as essential to commerce as the water itself; and that which is so essential to commerce can hardly be said to obstruct it.

The proofs presented upon this motion fail to satisfy me that the small space occupied by the plaintiffs' bath-house can cause any material interference with or obstruction of the free and common use of the river by the public. Of course, while such space is so, occupied it cannot be used by others, and so far it may be said to obstruct the public use. But so it may be said of a bridge with its draw closed. If, however, it is provided with a sufficient draw, it is a lawful structure, notwithstanding it may, at times, and to some extent, interrupt the public use of the stream (*Renwick* agt. *Moore*, 3 *Hill*, 621).

Nevertheless, such use of the slip would constitute it a public nuisance if it were not sanctioned by the commissioners' license. No person, without a grant, can permanently moor a floating structure in a public river. It would, *per se*,

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be a public nuisance (*Hart agt. Mayor, &c., of Albany*, 9 *Wend.*, 571). But assuming, as I must, that the grant or license to the plaintiffs is of a portion of the water not needed for navigation or commerce (except, perhaps, in exceptional cases), or, in other words, a grant that does not and will not essentially interrupt or obstruct the free and common navigation of the river, it must follow that the plaintiffs are lawfully in possession of the space they occupy, and cannot be dispossessed or disturbed in such possession, unless the grant or license from the dock commissioners is subject to a higher power lodged in the captain of the port and harbor-masters.

That question I will now examine. The powers of the last named officers are derived from acts of the legislature, passed in 1862 and 1867.

The act of 1862 provides, in section 7: "Each harbor-master shall have power, within the district assigned to him, to provide and assign suitable accommodations 'for all ships and vessels, and regulate them in the stations they are to occupy at the wharves or in the stream, and to remove from time to time such vessels as are not employed in receiving or discharging their cargoes, to make room for such others as require to be more immediately accommodated for the purpose of receiving or discharging their cargoes.'"

The distinctive duty of the captain of the port is of a supervisory nature. He may make rules and regulations, and give directions in aid and for the governance of harbor-masters; but the power of all such officers is derived chiefly, if not wholly, from the act of 1862.

Under that act it is claimed not only that the harbor-masters have the exclusive control over the slips and basins, and other navigable parts of the river, but that they are the ultimate arbiters of the manner in and purpose for which they may be used.

If a power so comprehensive could be claimed for the harbor-masters there would be a manifest inconsistency in

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the provisions in the statutes; and, as the city claims under the last statute (*act of 1871*), it would lead to the conclusion that the legislature intended to repeal the former. The saving clause, however, is found in the act of 1871, namely, that the powers and duties therein conferred upon the dock commissioners shall not affect the powers of the harbor-masters as now defined by law.

The powers and duties of these several officials are wholly distinct and separate. Those of the dock commissioners I have already defined.

The duties of the harbor-masters are of a conservative nature, and are only, but indispensably, necessary whenever an extensive commerce is carried on. Without some power of control over the arrival and departure of vessels and their moorage when in port, disorder and confusion would be the consequence. To regulate this, and to prevent disorder, these officials are clothed by the legislature with a constabulary or police power, and made *quasi* conservators of the peace.

They are, however, officers of limited jurisdiction, and can exercise such powers only as are expressly given, or which can necessarily be implied from such as are expressly given. Such express powers, as defined by the statutes, are to provide and assign suitable accommodations for ships and vessels, and to remove such as are not employed in receiving or discharging cargo, and to make room for such others as require to be more immediately accommodated for the purpose of receiving or discharging cargo. The object of all this is to prevent over crowding, confusion and disorder, and to secure just and equal right in the use of the harbor.

To this extent the harbor-masters have jurisdiction. They may regulate the time and manner that ships and vessels shall occupy slips and basins for purposes of commerce, and determine between the conflicting claims of vessels, and as to their respective rights and priorities to discharge or receive their cargoes.

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These duties do not at all conflict with the powers of the dock commissioners, and the two can move along in entire harmony.

The harbor-masters have a large discretion in assigning the use of the slips to vessels, and in determining the time and manner of using. But it is not an absolute or arbitrary power, which may be exerted without regard to the exigencies of the time and place. Like all discretionary powers, it must have a foundation of propriety or necessity to rest upon.

While they may lawfully prevent disorder and confusion, and, in the language of the act, remove such vessels as are not employed in receiving or discharging cargo, I cannot concede to them the right to make such removal, except for the purpose, also specified in the act, of making room for such others as require to be more immediately accommodated for the purpose of receiving or discharging their cargoes.

In the case of *Adams* agt. *Farmer* (1 *E. D. Smith*, 588) the common pleas held that, as the power was general, it was not limited to cases where other vessels required to be immediately accommodated in receiving or discharging cargo. But that decision cannot be reconciled with other decisions defining the extent of discretionary powers.

In *Vanderbilt* agt. *Adams* (7 *Cow.*, 349), the harbor-master had ordered the *Thistle*, lying at a wharf on the North river, to move a certain distance in order to give a berth to another vessel called the *Legislator*. The court say: "It will be observed that no question is raised as to the right of the steamboat *Legislator* to lie at this wharf had there been no other vessel occupying it. The ground of the defense is, that the law conferred no authority to interfere at all; the owner of the *Thistle* having the exclusive right of deciding whether to remove or not, in order to give place to another vessel. The right assumed by the harbor-masters under the law would not be upheld if exerted beyond what may be considered a necessary police regulation."

The board of health is supposed to be invested with large

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discretionary powers ; and by statute was required to cause all putrid or unsound meat, dead animals, etc., found in any street or other place, to be forthwith removed beyond the limits of the city. Under that statute this court held, in an action against an inspector for removing dead hogs (*Underwood* agt. *Green*, 3 *Robt.*, 86), that the discretion, and therefore the judgment, of the official was absolute, and he was not responsible for any error of judgment. But the court of appeals, reversing this court (42 *N. Y. R.*, 140), held otherwise. That while it was conceded that the officer in the discharge of his duties is clothed with a judicial discretion, yet he is an officer of a limited and special jurisdiction, and when in any given case his power is challenged, he must prove some facts invoking or tending to invoke the exercise of his discretion.

The general railroad act was supposed to confide absolutely to the directors the right to determine what lands were required for the purposes of the road. But in *Rensselaer & Saratoga R. R. Co.* agt. *Davis* (43 *N. Y. R.*, 137), the court held that the determination of the directors was not conclusive ; and that the court is to decide, upon the application, the question as to the necessity and extent of the appropriation.

The proposition to be deduced from these cases is, that when a power of any kind is to be exercised it must, have to uphold and justify its exercise, the support of sufficient facts.

Under this view of the case, before the harbor-master can direct the removal of a ship or vessel there must appear to be some necessity for it. It is not enough, in the language of one of the defendants, that he knows of no other place for the landing of certain merchandise. It must be shown that the place is, not may be, needed for some purpose connected with navigation or commerce. And until such necessity arises the officer is powerless to lawfully interfere.

In intrenching, as it may with some plausibility be claimed, upon the vested rights of the city, the legislature must be

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understood to have intended nothing more than is clearly expressed by the statute; and, therefore, to have merely invested the harbor-masters with certain prescribed police powers and duties in no way interfering with the proprietorship of the city. If it is successfully claimed to be otherwise, then the act would be open to the constitutional objection of taking vested rights without compensation.

But without pursuing the subject further, I am of opinion that if the space occupied by the bath-house is not needed for commerce, and the occupancy of it does not essentially interfere with the free and common use of the river for navigation, the permission to use it was within the power of the state to grant. That such grant was made to the department of docks, and its written permission to the plaintiffs gave them a lawful possession, of which they can be deprived only by its being established either that it is an essential interference with navigation, or that a necessity exists for its immediate use for the purposes of commerce.

The facts upon which this case, under the view which I have taken, must turn, namely, whether there is such an interference or obstruction of navigation as would render the grant void, or whether some immediate requirement or necessity of commerce exists to justify the interference of the harbor-masters, are questions of fact, and must be determined before the appropriate judgment can be pronounced.

It results from these views that the plaintiffs are in lawful possession, and cannot be disturbed until it appears that the space they occupy obstructs the public use or is needed for purposes of commerce.

As the case now stands I am justified in retaining the injunction until the trial.

Foote agt. Milbier.

SUPREME COURT.

MARY FOOTE, appellant, agt. JOSEPH MILBIER, respondent.

In an action for *malicious prosecution*, where the evidence tended to show that the defendant was informed by a person that the plaintiff did the malicious mischief to defendant's property for which she was prosecuted and arrested by the defendant ; but before the defendant had commenced proceedings for such arrest, the same person who gave the defendant the information acknowledged in his presence that he had made a false statement about the mischief, and that instead of the plaintiff doing it, he, the informant himself, did it, and offered to settle the matter :

Held, that a *nonsuit* in the action was improper. There was a question for the jury, whether, after the last information defendant had received, he commenced his action against the plaintiff in good faith or not.

Fourth Department, General Term. Argued at June Term, Buffalo. Decided at October Term, Rochester, 1873.

Before MULLIN, P. J., TALCOTT and E. D. SMITH, JJ.

APPEAL from a judgment of nonsuit at the Onondaga circuit. The facts, so far as the point upon which the decision turned is concerned, appear in the opinion.

FULLER, VANN & BROOKS, *for the appellant*, cited *Foshay* agt. *Ferguson* (2 *Denio*, 617, 619); *Miller* agt. *Milligan* (48 *Barb.*, 30, 33); *Haupt* agt. *Pohlman* (16 *Abb.* [N. S.], 301).

GRAY & COSTELLO, *for the respondent*, cited *Vanderbilt* agt. *Mathis* (5 *Duer*, 304); *Besson* agt. *Southard* (10 *N. Y.*, 236, 237); *Bulkley* agt. *Keletees* (6 *id.*, 384); *Masten* agt. *Dayde* (2 *Wend.*, 426).

By the Court, TALCOTT, J.—This is an action for a malicious prosecution. The plaintiff and her sister were arrested on the complaint of the defendant, charging them with malicious mischief, and were tried before the police justice of the city of Syracuse, and the complaint dismissed. The malicious

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mischievous charged was the daubing of the defendant's fence with paint. The fence was in fact daubed by one Slosser, who did it while in company with the plaintiff and her sister, who were walking ahead of him, and did not see Slosser when he did it, or knowing anything about it until after it was done. The evidence tended to show that Slosser, on the day following the transaction, told defendant's wife that the girls, meaning the plaintiff and her sister, did it, but it also tended to show that Slosser, subsequently, and before the defendant made the complaint in question, retracted, in the presence of the defendant, the statement he had made to the defendant's wife, admitted that he, himself, was guilty of the act, and that the girls had nothing to do with it, and agreed with him, by the payment of five dollars and procuring the fence to be repainted, to settle the matter.

This, as we understand the evidence, took place before the defendant made the complaint against the plaintiff and her sister. If this is the true construction of the testimony, we think there was a question for the jury, and the plaintiff was improperly nonsuited.

It is said by BRONSON, J., in *Foshay agt. Ferguson* (2 Denio, 617), that "the question of probable cause does not turn upon the guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence."

Undoubtedly the information which the defendant had received as to the statement of Slosser, if it stood alone, would, under the circumstances, furnish proof of probable cause for the accusation against the plaintiff; but we think that, after it appeared that Slosser had retracted his statement and admitted its falsity and acknowledged himself as the only guilty party, there was a question which should have been left to the jury, whether the defendant, when he made the complaint, actually credited the statement Slosser first made and commenced the prosecution in good faith.

The judgment should be reversed and a new trial granted, costs to abide the event.

Townsend agt. The Narragansett Fire and Marine Insurance Co.

N. Y. SUPERIOR COURT.

CHARLES R. TOWNSEND and THEODORE E. TOWNSEND, plaintiffs
and respondents, agt. THE NARRAGANSETT FIRE AND MARINE
INSURANCE COMPANY, defendant and appellant.

Where the rejection of the testimony of a witness offered in evidence on the trial is relevant, and therefore the rejection is error, yet the judgment will not for that reason be reversed, where it can be seen that the offered testimony is not of sufficient importance, when compared with the merits of the case, to have changed the verdict of the jury or affected the judgment in the case.

General Term, May, 1873.

Before BARBOUR, C. J., FREEDMAN and SEDGWICK, JJ.

APPEAL from judgment in favor of the plaintiffs.

SAMUEL JONES, *for appellant.*

OSBORN E. BRIGHT, *for respondents.*

By the Court, FREEDMAN, J.—This action is brought upon a policy of insurance. The jury found for the plaintiffs, and the appeal is from the judgment. Neither a motion for the direction of a verdict, nor a motion for a new trial was made below. We can, therefore, only look at the exceptions in determining defendant's right to a new trial. Of these, there seem to be but two that are of sufficient moment to be specially adverted to.

The first, which relates to defendant's offer to show the quantity of tea kept on hand by other dealers than the plaintiffs, has already been disposed of by us adversely to the defendant in the case of the same plaintiffs against The Merchants' Insurance Company, of Providence, R. I.

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The other relates to the exclusion of a certain question addressed by defendant's counsel, on folio 324, to one of plaintiffs' witnesses on his cross-examination, with the view of ascertaining from the lips of the witness, whether on the trial of the case against The Merchants' Insurance Company he had not given a somewhat different account of the doings of the members of a hook and ladder company in plaintiffs' store at the time of the fire, than he had given in this case. The question was a proper one, but it seems to have been excluded by the trial judge on his own motion and upon the supposition that the witness had already been interrogated upon that point and had substantially answered the question. The case shows that in point of fact the witness had been examined in that direction, but not sufficiently so as to make the said question, which was more specific than any he had already answered and more particularly directed his attention to his testimony given on the trial of the action against The Merchants' Insurance Company, an improper one. The question should, therefore, have been allowed. But the error, if error it was, is not of sufficient importance to call for a reversal of the judgment. The whole inquiry into the action of the hook and ladder men on the night and upon the premises in question, though relevant, was of a relatively unimportant character, when compared with the real merits of the case, and as to these, the case seems to have been thoroughly, ably and fairly tried. Indeed, it is easy to see from the report of the whole case that, even without a word of testimony from the witness referred to, the verdict of the jury would have been precisely the same. The error must, therefore, be disregarded (*City Bank of Brooklyn* agt. *Dearborn*, 20 *N. Y.*, 244; *Park Bank* agt. *Tilton*, 15 *Abb.*, 384).

The judgment should be affirmed, with costs.

BARBOUR, C. J., and SEDGWICK, J., concurred.

Clinton agt. Townsend.

SUPREME COURT.

GEORGE W. CLINTON, respondent, agt. EDMUND TOWNSEND,
appellant.

In an action to recover damages by reason of defendant *wrongfully and willfully* taking and using plaintiff's horse for several days, it is competent for the plaintiff on the trial to prove *as damages*, that he was compelled to hire another horse and pay a certain amount therefor, during the absence of defendant with his horse; and also to prove as damages injuries to the horse by the defendant, during the same time.

In Third Department, at Albany General Term, June, 1873.

Before PARKER, P. J., BOARDMAN and J. POTTER, JJ.

ACTION to recover damages for the alleged wrongful taking and detention of a horse.

The cause was tried before a justice of the peace and a jury, in the county of Otsego.

The defendant took the horse in question on 12th day of May, 1871, drove the same into Madison county after a load of hop roots, and returned it to the plaintiff on the 17th. This the defendant did in the course of his employment by the express direction of one William Clinton, who claimed the right to use and contract the same.

On the trial of the action the justice allowed the plaintiff to prove as a part of his damages, under defendant's objections as incompetent and improper, the amount paid for the use of *another* horse while the one in question was gone; and also by a subsequent witness the *value of the use* of the horse during the same time.

The value of the use of the horse was proved at twelve dollars, and the amount paid for use of another horse was proved

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at five dollars. No other proof of damages was given on the trial.

The jury rendered a verdict of twenty dollars in favor of the plaintiff, thus including both amounts. From the judgment entered thereon, with costs, the defendant appealed to the Otsego county court, where the judgment was affirmed.

Thereupon a further appeal was brought to this court.

E. COUNTRYMAN, *attorney for defendant, appellant.*

I. The justice erred in receiving the evidence of the amount paid by respondent for the use of another horse.

Appellant's objections to the evidence were sufficiently specific to raise the question of its inadmissibility (*Roe agt. Hanson*, 5 *Lansing*, 304).

The general rule is, that the recovery of damages must be confined to the *legal, natural and proximate consequences* of the tortious act (2 *Greenleaf on Ev.*, 5th ed., § 256; *Crain agt. Petrie*, 6 *Hill*, 524; *Hicks agt. Foster*, 13 *Barb.*, 665; *Butler agt. Kent*, 19 *Johns.*, 228; *Twynam agt. Swart*, 4 *Lansing*, 263; *Clark agt. Brown*, 18 *Wend.*, 213, 229).

This rule applies with equal force to claims for special damages (*Crain agt. Petrie*, *supra*, and cases there cited).

Clearly the expense of hiring *another* horse was not the *natural and proximate* result of the alleged trespass. It was an illegal element of damages in the case (*Edwards agt. Beebe*, 48 *Barb.*, 106; *Twynam agt. Swart*, 4 *Lansing*, 263).

The county judge distinctly held the evidence to be illegal and improper. In his opinion he says: "Yet it was an *erroneous decision of the justice to permit the plaintiff to show how much he paid for the use of another horse*. The natural damages arising from the use of the horse were properly shown by the witness Knapp; but can it be said that if the plaintiff paid some *extravagant price for the use of some particular horse*, that that should form the basis upon which to assess damages against the defendant? *I think not.*"

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Notwithstanding the error, however, the county judge affirmed the judgment for the reason, as stated by him, that he was "*satisfied that the improper evidence of the amount paid for the use of another horse did not influence the jury as to their verdict to the detriment of defendant.*"

II. It is impossible for the court to say as the county judge did, that "*the improper evidence * * * did not influence the jury as to their verdict to the detriment of defendant.*" As the verdict is more than all the elements of the damages proved, taken together, the presumption is that all were included. At least it cannot be said they were not included. A twofold recompense was thereby allowed. The presumption is the jury intended to award compensation only, and not to inflict punishment (*Sedgwick on Damages*, 3d ed., 597, marg., 563).

The law on this point is entirely settled and very clearly and succinctly stated by the court of appeals in the case of *Baird agt. Gillett* (47 N. Y., 186), where improper evidence had been received, in the following language: "The evidence is improper, and as the court *cannot say that it might not have biased the jury and influenced the result*, its admission, under objection, was error for which the judgment should be reversed (*citing Williams agt. Fitch*, 18 N. Y., 546). If improper evidence be given upon the trial, although it be merely *cumulative*, it will be cause for reversal (*citing Osgood agt. Manhattan Company*, 3 Cow., 612). If the evidence *could not possibly* have injured the defendant, the error might be disregarded; but when *illegal evidence is admitted which bears in the least degree on the result, it is fatal* (*citing cases*). By *admitting the evidence* under the objection of the defendant, *the jury were authorized to regard it as competent and relevant* to the issue in the action, and as tending in a greater or less degree to prove the cause of action" (*Baird agt. Gillett*, 47 N. Y., 186; *Starbird agt. Barrows*, 43 N. Y., 200; *Wilson agt. Wilson*, 4 Keyes, 413; *Williams agt. Fitch*, 18 N. Y., 546; *Worral agt. Parmelee*, 1 N. Y.

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516; *Dresser* agt. *Ainsworth*, 9 *Barb.*, 619; *Boyle* agt. *Coleman*, 13 *Barb.*, 43; *Penfield* agt. *Carpenter*, 13 *Johns.*, 349).

The action being for the recovery of unliquidated damages for an alleged malicious wrong, the court have no power to reverse as to part, but must reverse the judgment wholly and absolutely (*Cassin* agt. *Delancy*, 38 *N. Y.*, 178).

III. An improper measure of damages was adopted on the trial, and no legal damages were proven.

A party from whom property is taken tortiously may refuse to accept its return (*Lyon* agt. *Yates*, 52 *Barb.*, 244; *Haumer* agt. *Wilsey*, 17 *Wend.*, 91).

And where the property so taken has not been returned to the owner, and no exemplary damages recoverable, the true measure of damages is the same as in trover—the market value of the property at the time it was taken, to which interest may, in the discretion of the jury, be added, as damages for the detention (*Sedgwick on Damages*, p. 558; *Campbell* agt. *Woodworth*, 26 *Barb.*, 648; *King* agt. *Orser*, 4 *Duer*, 433; *Dailey* agt. *Crowley*, 5 *Lansing*, 301; *Suydam* agt. *Jenkins*, 3 *Sandf.*, 643; *Kelley* agt. *Archer*, 48 *Barb.*, 68; *Twinnam* agt. *Swart*, 4 *Lansing*, 263, 271–273).

The return of the property is always admissible in evidence to mitigate the damages. And such return will mitigate to the extent of the market value of the property when it was returned (*Dailey* agt. *Crowley*, 5 *Lansing*, 301; *Lyon* agt. *Yates*, 52 *Barb.*, 237, 248; *Vosburgh* agt. *Welch*, 11 *Johns.*, 191; *Haumer* agt. *Wilsey*, 17 *Wend.*, 91).

If the taking was malicious, and a deliberate intent to injure is manifest, the jury, undoubtedly, have the power to award exemplary damages. But that does not change the rule by which the other or compensatory damages are determined, for the exemplary damages are simply *added* to them.

It follows from these well established principles of law that the true measure of damages in this case was the market value of the horse at the time it was taken, less the market value

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thereof when it was returned, together with interest on its value during the time the same was detained.

And if there is anything in this case to justify exemplary damages (which we deny), the jury may add to the damages which this rule will give such a sum, by way of punishment, as the nature of the case requires.

This rule of damages was adopted in a case very similar to the one at bar, to which the attention of the court is invited (*Lucas agt. Trumbull*, 15 *Gray [Mass.]*, 306).

For the foregoing reasons, the judgment of the county court and that of the justice must be reversed, with costs.

A. J. LYNES, *attorney for respondent, plaintiff.*

I. There was no error in allowing the plaintiff to give the evidence.

In *Bennett agt. Lockwood* (20 *Wend.*, 223) the court say that it makes no difference that the damages thus claimed were not the natural or necessary consequences of the wrongful taking. It is no objection to the recovery, if the damages were proximate and not too remote, *and were claimed in the declaration*. In that case the plaintiff recovered fifty-three dollars damages for time spent and expenses incurred in looking up the property wrongfully taken. In the case of *McDonald agt. North* (47 *Barb.*, 530) the court cites *Bennett agt. Lockwood*, and affirms the doctrine laid down. In *Sedgwick on Damages*, p. 475, speaking of damages in trover, the following language is used: "It was suggested by PARK, B., at *nisi prius*, that the plaintiff could recover special damages if laid in the declaration, as in trover for the conversion of a horse; that the plaintiff could recover for money paid for the hire of other horses; and it has since been so decided by the queen's bench in trover, brought by a carpenter for his tools." (7 *Cur. & Payne*, 804; 8 *Q. B.*, 779; 2 *Bing. N. C.*, 310; *Sedgwick on Damages*, 475).

The principle is the same in both cases; and if the evidence is proper in one case it is in the other. Willful, aggra-

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vated trespass was alleged and proved, and, therefore, the plaintiff had a right to show all the circumstances of the case, and the consequences of the wrongful act himself (*Bateman* agt. *Goodyear*, 12 *Conn.*, 580; *Sedgwick on Damages*, 616).

The plaintiff was entitled to exemplary damages; and for the purpose for estimating such damages properly the jury should know all the facts and circumstances of the case, the situation of the plaintiff, and to what extent he was injured by the wrongful act of the defendant (*Sedgwick on Damages*, 531, 532 and 534).

The plaintiff was entitled to recover full compensation for the wrong committed. The owner to whom compensation is due must be fully indemnified (*Sydam* agt. *Jarkins*, 3 *Sanford*, 614).

The defendant was not injured by the evidence, as there was sufficient evidence given without objection to sustain and warrant a much larger verdict (5 *Barb.*, 283; 12 *id.*, 382; 13 *id.*, 116; 19 *id.*, 343; 1 *Hilton*, 199).

The judgment should be affirmed, with costs.

By the Court, J. POTTER, *J.*—This is an appeal from a judgment of the county court of Otsego county, affirming the judgment of a justice's court, entered upon the verdict of a jury for the plaintiff for twenty dollars damages.

The action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of the defendant's wrongfully, willfully, &c., entering plaintiff's barn, taking plaintiff's horse therefrom, and going a long journey, lasting several days; also for ill-treating and overworking the horse, which was thereby lessened in value; and also for the trouble and expense of plaintiff in procuring another horse to transact his business, &c., in the mean time.

The answer is a general denial. Much of the evidence upon the trial related to the ownership of the horse; but no question arises upon that subject.

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The horse was returned to the possession of the plaintiff.

The only question upon this appeal relates to the evidence of damages.

The plaintiff proved upon the trial that, during the time the defendant deprived plaintiff of his horse, the plaintiff was compelled to hire another horse, and to pay therefor the sum of five dollars.

Assuming, now, that such evidence was properly objected to, the question will be, was such evidence proper as an item or rule of damages?

The county court held the evidence was improper, but affirmed the judgment notwithstanding; holding that, though the evidence was improper and well objected to, it manifestly did no harm.

I am inclined to think the views of the county judge were erroneous in holding that the evidence was improper, and harmless if improper. The gist of the action was not the conversion of the horse, but for unlawfully depriving plaintiff of the use of his horse, and for injuries done to the horse while thus depriving plaintiff of the use, and for compelling plaintiff to hire and pay out money for a necessary substitute for that of which he had been unlawfully deprived.

Plaintiff proved that his necessary business required the use of a horse while defendant had his horse; that he procured the use of another at the lowest price, and that the price he was compelled to pay was just and reasonable.

I think the price plaintiff was compelled to pay being reasonable and the lowest he could obtain a substitute for, was the natural, necessary and proximate consequence of defendant's wrongful act, and was therefore an item of legitimate damage and recoverable in this action.

In *Bennett* agt. *Lockwood* (20 *Wend.*, 223) and *McDonald* agt. *North* (47 *Barb.*, 530) the court held that time and money spent in looking up property unlawfully taken from plaintiff may be recovered for as damages.

In *Albert* agt. *The Bleecker St. R. R. Co.* (2 *Daly*), the

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plaintiff was allowed to recover the profits of his business (expressman) while he was deprived of the use of his horse by defendant's wrongful act and while procuring a substitute (*Albany Law Journal*, vol. 8, 125 page; *Allen agt. Fox, commission of appeals*).

In *Syds agt. Hay* (4 *T. R.*, 264) it was held plaintiff might recover what he had been compelled to pay to procure another.

This case is affirmed in 2 *Bing. N. C.* (7 *Car. & Payne*, 804).

It has been held in those English cases that the owner might recover the value of carpenters' and joiners' tools, and also damages for loss of profits for the necessary time it required to supply their place. I do not doubt that such proof was proper.

Plaintiff also gave proof of what the use of his horse was worth by the day while defendant had him, and also some proof of injuries. This latter proof was controverted, and it was proper for the jury to allow damages for such injuries if they were satisfied the horse was injured by defendant.

Plaintiff was compelled to hire a horse for three of the five days defendant had plaintiff's horse.

It is not to be presumed when there were several items of legitimate damages that the jury allowed plaintiff for the sum he was compelled to pay out for a horse for the three days, and also for the two dollars a day which the use of a horse was worth for the five days that defendant had plaintiff's horse.

The presumption is that the jury allowed the plaintiff in their verdict for the five dollars he paid out for the use of another horse for the three days and for the other two of the five days defendant had plaintiff's horse at the rate proved, and the balance of their verdict was for injuries to the horse.

I think the judgment should be affirmed, with costs

PARKER and BOARDMAN, JJ., concurred.

Langbein agt. Gross.

N. Y. COMMON PLEAS.

LANGBEIN agt. GROSS.

Although section 416 of the Code requires parties to *file pleadings without notice*, yet where notice has been given as an act of courtesy, and the pleadings have not been filed, and an affidavit is necessary in proof of the omission and to obtain an order to compel the filing, ten dollars costs will be allowed the moving party for his trouble.*

Special Term, September 26th, 1873.

THE plaintiff filed his complaint with the clerk of the court pursuant to section 416 of the Code of Procedure, and after waiting ten days, and defendant not filing his answer, he served the following notice on defendant's attorney:

"Title, etc. Sir: Please to take notice that the pleadings on the part of the plaintiff have been filed, and you are hereby required to file with the clerk of this court the pleadings on the part of the defendant in this action pursuant to section 416 of the Code of Procedure, or in default thereof I shall apply to one of the judges of this court, without further notice, pursuant to said section, for an order to that effect, or that the answer of the defendant be deemed abandoned with costs of motion.

Yours, etc.,

LOUIS H. ROWAN

Attorney for Plaintiff.

TO ANDREW G. CROUSEY, Esq.,

Attorney for Defendant.

Dated NEW YORK, *Sept. 3d*, 1873."

* *Quere?* Whether under this decision most attorneys will not deem it the better practice to give notice as an act of courtesy requiring the pleadings to be filed.—REP.

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The defendant still not filing his answer the plaintiff obtained an order without notice, upon an affidavit setting forth the foregoing facts, "that the defendant, Jacob A. Gross, file his pleading in this action with the clerk of this court within five days from the service of a copy of this order, or in default thereof the said pleading of said defendant be deemed abandoned, and that plaintiffs now have ten dollars costs of this motion."

Upon the service of this order, the defendant, after waiting till the fifth day, filed the answer and then served an order to show cause why the order "should not be resettled by striking out the provision or direction that plaintiffs have ten dollars costs of motion."

ANDREW G. CROSEY, *for the defendant (for the motion)*, contended it was a mere favor to plaintiffs to have the pleading filed, and there should be no costs, as section 416 provided for none, and cited *Jones* agt. *United States Slate Co.* (16 *How. Pr.*, 129), and *Browne* agt. *Anthony* (13 *How. Pr. Rep.*, 301).

GEORGE F. LANGBEIN, *plaintiff in opposition*, cited section 315 of the Code, and contended that the various steps necessary to compel a defendant unwilling to file his answer were fully worth ten dollars costs which the judge, in his discretion, had imposed.

J. F. DALY, *J.*, *Held* that section 416 of the Code required parties to file pleadings without notice, yet in this case notice to file had been given as a matter of courtesy, and the pleadings not having been filed, and the opposite party being obliged to draw and present an affidavit in proof of his omission, and to obtain an order to compel the filing, it was proper to insert ten dollars costs in the order for the trouble the party had been put to, and therefore denied the motion.

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N. Y. SUPREME COURT:

J. AUGUSTUS PAGE agt. PATRICK McDONNELL *et al.*

Where a purchaser and vendor enter into a contract for the sale of real estate free from incumbrance, except as stated in the contract, and the purchaser makes a payment down of a part of the purchase-money, the remainder to be paid and adjusted at a future day appointed, when the deed is to be delivered, and on the tender of the deed by the vendor on the day specified the purchaser objects to accepting it on the ground of an assessment upon the property, but says he is willing to take the deed when the vendor can give him a good title, and on the next day the vendor, having paid off the assessment, tenders the purchaser the deed again and requests performance of the contract, which the purchaser refuses on the ground that there are unexpired leases on the property, which was known to the purchaser and provided for in the contract, this last refusal of the purchaser to take the title puts an end to the contract, and he cannot recover back his payment made to the vendor.

First Department, New York General Term, May, 1873.
Before INGRAHAM, P. J., LEARNED and BRADY, JJ.

On the twenty-fourth day of November, 1868, the plaintiff and the defendants made and executed the contract of sale set out in the complaint in this action.

At the time the premises described in said contract were subject to certain leases at an aggregate rent of about \$4,200 a year, payable monthly in advance; all of which would expire on the first of May following.

The plaintiff, when he executed the contract, knew of the existence of all these leases, and the understanding was that he should receive the rents to accrue thereon from the date of the contract, in consideration of the agreement on his part to pay interest from the same period on the unpaid portion of the purchase-money for said premises.

On the execution of the contract, the sum of \$2,000 was

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paid by the plaintiff to the defendants, as and for the first payment said contract provided for.

On the tenth day of February, 1869, at one o'clock precisely, in the afternoon of that day, the defendants attended and were at the office of Beeman & Haws, No. 175 Broadway, in the city of New York, for the purpose of fulfilling their part of said contract, and waited there for the plaintiff over two hours.

The plaintiff did not make his appearance during that time, but the defendant, Patrick McDonnell, afterwards, and on the same day, met him in the street, and tendered him a proper deed for the premises in question, which deed was duly executed and acknowledged by both of said defendants, and contained a general warranty and the usual full covenants for the conveying or assuring to the plaintiff the fee simple of said premises, free from all incumbrances, except the mortgages in said contract referred to, and accompanying said deed were the necessary United States revenue stamps therefor.

The plaintiff then objected that there was a lien on said premises for an assessment for the extension of Church street between Fulton and Morris streets, but said he was willing to take the property when the defendants could give him a deed according to the contract.

On the next day, the eleventh of February, the defendant, Patrick McDonnell, paid off said assessment, and obtained a proper receipt, discharging said premises from the lien of the same, and showed such receipt to the plaintiff, and again tendered him the deed, together with a statement in writing of the amount of rents which he had collected on said leases, since the date of the contract, and the money for the same in greenbacks, and called for the execution of the contract on the part of the plaintiff.

The plaintiff again refused to take the deed and fulfill on his part, alleging as a reason that he regarded the leases on the premises, which would not expire until the first of May

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following, as incumbrances. There were no other leases on said premises at that time than those which existed thereon when the contract was made, and of which the plaintiff had knowledge as aforesaid. The defendant, Patrick McDonnell, in reply, said that the plaintiff knew of these leases when the contract was made, and that if he refused to take the deed and fulfill the agreement on his part, the defendants would consider the agreement at an end. The plaintiff persisted in his refusal to take the deed until said leases should be terminated, and he could have immediate possession of the premises, but said that "he meant to have the property;" and the defendants afterwards renewed the leases in question for another year.

C. GOEPP, *for the plaintiff, appellant.*

I. The defendants did not acquire a right, by plaintiff's refusal to accept the second tender, to consider the contract at an end, without returning the money paid by the plaintiff.

"Generally, no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were before the contract was made" (2 *Pars. on Contr.*, 679; and see fully *id.*, note [a] citing *Hunt agt. Sills*, 5 *East*, 249).

If Mr. Page's refusal to accept on the 11th of February was a breach of his contract, the defendants had their choice of two remedies; one to return the \$2,000 and rescind the contract, the other to bring an action for specific performance, or for their damages, if they had sustained any. They cannot rescind the contract and nevertheless keep the money received upon it. They elected to rescind, but did not return the money.

Junkins agt. Simpson (14 *Maine*, 364), is a case closely in point. Simpson had exchanged oxen with Junkins, and had paid him ten dollars to boot. Junkins discovered that the oxen received by him were subject to a mortgage. He drove

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them back, and took his original oxen home again. *Held*, that he had no right to rescind the contract *without refunding the ten dollars*.

A contract cannot be rescinded by one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It cannot be rescinded as to one party, and remain in force as to the other. It must be rescinded *in toto*, and if the party rescinding has received property of any value, however inconsiderable, under the contract, he must restore it to the other party (WILDE, J., in *Coolridge agt. Brigham*, 2 *Metcalf*, 550).

Where a vendee seeks to rescind for want of title in the vendor, he must restore to the vendor all he received, and place him back in his original position (*Brown agt. Witter*, 10 *Ohio*, 142).

Assuming, for the sake of argument, that Mr. Page was in default in refusing to accept the conveyance on the eleventh of February, he did not thereby forfeit the \$2,000. Had the McDonnells claimed specific performance, Page would have been entitled to his credit for the \$2,000 on the purchase money. Had they sued for damages, he would have been entitled to recoup the \$2,000 against any damages they could have shown. They did neither, but elected to rescind the contract. This leaves them liable to return the plaintiff the \$2,000 with their interest.

Under the Code this court has the most ample powers to give equitable relief in this action, and relief to which the facts proved entitle the plaintiff, without regard to the form of the prayer of his complaint.

The case of *Ketchum agt. Evertson*, cited by the court below, to the point that Mr. Page cannot recover the hand money, proceeded on the assumption that the plaintiff (the vendee) had himself violated the contract. If we succeed in showing that Mr. Paige was not in default, the principle of *Ketchum agt. Evertson* does not apply. But not only was the plaintiff in default, in *Ketchum agt. Evertson*, but the

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defendant was not. Now, in the case at bar, the defendants were clearly at fault.

It is this circumstance which distinguishes *Ketchum* agt. *Evertson* from *Raymond* agt. *Bearnard* (12 *Johns.*, 274). There the plaintiff was in default, and the defendants availed themselves of the default to rescind. "Therefore the defendants ought not to be permitted to set up the contract which they have themselves rescinded for holding the money advanced" (1 *Term R.*, 133; 1 *Bos. & Pu. [N. S.]*, 353; 5 *Johns. R.*, 87; 7 *id.*, 132).

Raymond agt. *Bearnard* is sustained, and the distinction between it and *Ketchum* agt. *Evertson* fully explained, in *Monroe* agt. *Reynolds* (47 *Barb.*, 579). "The mere neglect to perform does not authorize the other party to treat the contract as rescinded or abandoned. The seller must go further" (*Dubois* agt. *Del. & Hud. Can. Co.*, 4 *Wend.*, 289; *Main* agt. *King*, 8 *Barb.*, 535; *Fancher* agt. *Goodman*, 29 *id.*, 315).

II. The plaintiff did not agree to extend the defendants' time for performance, when defendants failed to perform on the 10th of February, 1869.

Both in the findings of fact and in the opinion of the court it is said that "the plaintiff told McDonnell he was willing to take the conveyance *when* McDonnell could give a good title." The witness' words are: "I told him I was ready to take the property *if* he could give me a deed *according to the contract*." The difference between "when" and "if" is not great, but is sufficient to decide this question. The plaintiff did not offer to wait to a subsequent day, but offered to comply *then*, if defendant would comply then. On the evening of that day he had an unqualified election to insist on the specific performance of the contract, or to claim damages for its non-performance, or to rescind it. That election still belongs to him, because the defendants have declined to avail themselves of the opportunity afforded by the notice of April twenty-ninth.

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The result is that it was entirely optional with the plaintiff to take the conveyance on the 11th of February or not, and that if he chose not to do so, it is wholly immaterial whether the reason he gave was a good or a bad one. The utmost effect that could be given to his refusal, if made for an insufficient reason, is that he thereby waived his right to specific performance.

III. The leases in question were "incumbrances" within the meaning of the contract.

The court find, not as matter of fact, but as matter of law, that the leases "were not regarded by the parties, at the time they executed the contract, as incumbrances." From the circumstance that this is found as a conclusion of law, the inference would arise that it is the interpretation given to the deed, without looking out of its four corners. But on examination of the document, this is hardly probable.

There is not a word *in the agreement* that will bear the construction that Mr. Page agreed to buy subject to leases and lettings to May 1st, 1869. The words "and to receive the rents from the date hereof" import no such agreement on Mr. Page's part. They are abundantly satisfied by referring them to rents to accrue between November 24th, 1868, and February 10th, 1869, or March 1st, 1869, at furthest, to which date Mr. Page probably understood them to refer.

The fact that the mortgage and all intervening taxes and assessments are expressly excepted, would seem sufficient alone to prevent the exception from being extended to leases.

That an outstanding lease is an incumbrance will not be disputed (*See Jerome agt. Scudder*, 2 Robt., 169).

On reference to the opinion of the court, however, it becomes manifest that this construction of the instrument is not drawn from the four corners. The court say: "I think the parol evidence shows that when the plaintiff executed the agreement, the leases were not regarded as incumbrances within the meaning of the contract."

So then this finding is a finding of fact, deduced from parol

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evidence. The opinion does not indicate how the evidence is held to prove the finding. We contend that it is impossible to draw such an inference from the evidence.

Taken most strongly for the defendant, McDonnell's testimony shows that he, the vendor, before the agreement of sale was made, informed the vendee that there were *then* other incumbrances on the property besides the \$14,000 mortgage. After giving this information he, nevertheless, covenants, under seal, to convey the property on the 10th of February, 1869, *clear of all incumbrances except the mortgage*. Mr. Page had a right to rely on this covenant, and to assume that McDonnell would find means to remove the other incumbrances by the 10th of February. This is what McDonnell, by his contract, bound himself to do.

It is an every-day occurrence for a vendor to covenant to give a free title in the future when there are incumbrances at the time of making the contract, and when that fact is known to the vendee.

If Mr. McDonnell desired and intended to sell the property subject to leases up to May 1st, 1869, he should have inserted a provision to that effect in his sealed contract of sale.

It would be most unsound doctrine to hold that proof of mere *knowledge* by a vendee of the existence, at the time of the contract, of other incumbrances than those stipulated for in the contract, should make it incumbent on him to accept the property subject to those other incumbrances. The vendor's covenant binds him to procure the removal of those incumbrances before the time of conveying, and the vendee has a right to rely on that covenant, and is presumed to do so.

A vendor agrees to sell, clear of incumbrances, except a first mortgage of \$14,000. At the time the agreement is made, the property is under a lease of five years, of which the vendee has notice. The time for giving possession arrives, and the lease has not been canceled nor removed. Is the vendee bound to accept? Certainly not. A vendor

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may covenant to make title at a future day to land which he does not even own. If he has not succeeded in obtaining a title when the time for conveying arrives, can he defeat the vendee's suit to recover back the money paid by him, and damages, by proof that the vendee knew, at the time of making the contract, that the vendor had no title? There is no reason why he should.

This contract was to procure the title in time to make the conveyance according to the contract.

IV. Parol evidence was not admissible to show that the leases on the premises were not regarded by the parties as *incumbrances* within the meaning of the word *incumbrances*, as used in the agreement.

The court below very unqualifiedly lay down the law, that such evidence *was* admissible, and imply that authorities need not be cited in support of the position. It is a point on which cases are exceedingly numerous. But it is admitted that there is a line of distinction *somewhere*; and the line has been said to be that extrinsic testimony can only explain and identify the *subject-matter*, but can never qualify the *operation* of the contract. Now these leases were certainly not the subject-matter; the word occurs in fixing the degree of security the purchaser was to have for his purchase.

If Mr. Parsons correctly states the law, *no evidence*, parol or other, could be received to show that the parties, in using the word *incumbrances*, did not mean what they said. "We cannot," says WILLES, C. J., in *Parkhurst* agt. *Smith* (*Willes* 332), put a construction on the words of a deed directly contrary to the plain sense of them." "Words," says Mr. Parsons (*vol. 2, p. 494*), "must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, expressed a very different meaning from that intended." "If the words employed were those intended to be used, but their actual meaning was totally different from that which the parties supposed and

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intended them to bear, still this actual meaning would be held to be their legal meaning" (*In p. 496, citing Adams' Equity, p. 169, et seq.*).

"A contract may be enforced in its plain and natural, or in its legal meaning, although evidence be offered tending to show that the intention of the parties differed absolutely from their language, unless the transaction be void from fraud, illegality, incapacity, or in some similar way" (2 *Pars. Confs.*, 566).

A written agreement to pay \$7,000 for building a conduit does not bind the payor to refund the fee paid for a license to top the sewer; and parol proof cannot be received to the contrary (*Thorp agt. Ross, 4 Keyes, 546*).

Transfer of all the assets of a firm includes a bank account unknown to all the parties; and parol proof cannot be received that an inventory was made at the time, omitting the account (*Crane agt. Union Bk. Rochester, 4 Keyes, 558*).

Clear and distinct contract, as for carrying specie, cannot be qualified by oral proof of custom, as that the carrier was not responsible for a loss occurring on the Isthmus (*Simmons agt. Law, 3 Keyes, 217*).

Even a mistake which would have been corrected in equity cannot be corrected in a trial at law by proof of conversations at the time (*Bush agt. Tilly, 49 Barb., 604*).

V. It is not proved that the plaintiff knew of the leases on the property when he executed the contract.

Mr. Page's account of the conversation had before the making of the contract is the most probable and the most worthy of belief.

Mr. Haws, a disinterested witness, who was present, and listened, and, as Mr. McDonnell says, was very anxious to bring about this sale, heard no such information given to Mr. Page.

The burden of proving knowledge on the part of Mr. Page, if material, was on the defense. They produce but one witness, the defendant, Patrick, himself, who is positively con-

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tradicted by Mr. Page. This leaves the allegation of knowledge "unproven." Hr. Haws' testimony is, negatively at least, in favor of the plaintiff and against the defendants. The preponderance of evidence on this question of knowledge is not only not in defendants' favor, but is positively against them.

Mr. Page undoubtedly knew that the premises were occupied and were bringing rent. He was not informed until what time they were let. He supposed (as he had a right to suppose) that they were let from month to month, and assumed that he would obtain possession by the 1st of March, 1869, at the latest. *He took McDonnell's covenant that he should have possession on the tenth of February.*

The statute, which provides that in the city of New York any indefinite letting shall be held to be a letting until the first of May then next, does not affect the question. When a party about to buy property is informed that it is *then* occupied, this statute raises no presumption that it is occupied to the first of May then next. Notwithstanding this statute, there are many definite lettings of property for a month or less. A great deal of property in New York is habitually and constantly let from month to month. Mr. Page's knowledge that the property was occupied is not knowledge that it was to let to May 1st, 1869.

VI. Appellant's first and eighth exceptions to evidence were well taken. After having proved the contract, the offer to perform by appellant, and the breach, appellant offered to show that about the time of the breach the property went up in value and the plaintiff could have sold it at an advance. This evidence was excluded.

Unfortunately, the counsel who tried the cause for the plaintiff is deceased, and the bills of exception do not disclose the reason of the exclusion.

The general rule that the measure of damages is the highest market price noted between the time of the breach and that of the trial will not be disputed.

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Nor is it perceived that there is room to contend that any circumstance takes the case at bar out of that general rule.

It cannot be said that the plaintiff had laid no ground for the question. The making of the contract was admitted in the answer. It was not pretended that defendant had performed. The testimony then given shows he could not. The defendant admitted that plaintiff had offered in writing to perform on his part on the 29th of April, 1869, and it was proved that on the tenth of February he had told defendant he was ready to take the property if defendant could give him a deed according to the contract, and that plaintiff "was ready to pay the money at any time defendant was ready to give the deed."

VII. Appellant's second and ninth exceptions to evidence were well taken.

The loss of interest, if sustained, is certainly an element in the computation of damages.

As argued under the former exception, sufficient ground for this question had clearly been laid.

VIII. Plaintiff's sixth exception to evidence was well taken.

Plaintiff's counsel desired to ask the plaintiff, who was on the stand: "When you made that agreement, did you or not expect to get actual possession on the 10th of February, 1869?"

The expectations of a witness are always immaterial; but the expectation of the *party* in this case is the lever by which the defendants are endeavoring to overturn their own sealed agreement. It is the issue of their own making. While the answer, if given, would not have been the weightiest sort of evidence, it is not perceived on what principle it could be excluded.

IX. Appellant's seventh exception to evidence is well taken.

The plaintiff's counsel offered to ask the question: "What is the customary way of letting parts of houses in the city of New York?"

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In the absence of direct information in the particular case, the plaintiff, on being told that the houses were let in apartments, had the right to presume that they were let according to the custom of the place.

COLES MORRIS, *for defendants, respondents.*

I. Most of the foregoing facts are undisputed, and the rest have been found by the learned justice who tried the case upon a conflict of evidence. These findings will not be disturbed by this court (*Baker* agt. *Spencer*, 58 *Barb.*, *S. C. R.*, p. 250).

II. The plaintiff did not request the said justice to find either of the facts stated in either of his exceptions twelfth, thirteenth, fourteenth, fifteenth or sixteenth, set out on pages 47 and 48 of the case. There is no evidence in the case of his having made any such request.

III. The plaintiff did not treat the inability of the defendants on the 10th of February, 1869, to convey as they had agreed, as putting an end to the contract, but quite the contrary; and the rights of the parties in this action depend on the transactions which took place between them on the 11th day of February, 1869, when the second tender of the deed was made.

It is entirely immaterial what objections the plaintiff made to the title offered to him by the defendants on the 10th of February, 1869. He did not rescind the contract on account of any such objection, but said he was willing to take the property when the defendants could give him a deed according to the contract. The defendants having paid off the assessment for the extension of Church street, and made a second tender of the deed, &c., on the 11th day of February, 1869, the only question is whether they were able on that day to convey to the plaintiff the premises in question in accordance with their contract. There is no question that the deed which they then tendered to the plaintiff was unobjectionable

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in form, and that simultaneously therewith they also tendered to the plaintiff the rents which had accrued from the premises from the date of the contract.

Besides, even on the said 11th day of February, 1869, the plaintiff, while still objecting to the title, said that he "meant to have the property."

IV. The only objection which the plaintiff made to the title offered to him by the defendants on the 11th of February, 1869, was that he regarded the leases on the premises, which would not expire until first May following, as incumbrances not excepted by the contract. There were no other leases on said premises at that time than those which existed thereon when the contract was made. And the plaintiff does not deny that he had knowledge of the existence of such leases, but he says he thought they were "monthly leases" and did not know that some of them would expire until 1st May, 1869. The defendant, Patrick McDonnell, on the other hand, testifies that before the contract was signed, he was asked how soon the leases would expire, and that he expressly told the plaintiff "that there were some verbal and some written leases, and that they all expired on first May next ensuing." And the said justice, upon this conflict of testimony, has found this fact in favor of the defendants. But there being no pretense of a misrepresentation or fraudulent concealment of this fact by the defendants (if it were a fact), the plaintiff's want of knowledge or mistake in relation to it is entirely immaterial.

Such want of knowledge or mistake on the part of the plaintiff would not avail him, under the circumstances of this case, even if the action had been brought for the express purpose of obtaining relief from the contract in question on that ground, and recovering the purchase-money paid (*Willard's Eq. Jur.*, p. 71; *Taylor agt. Fleet*, 4 Barb., S. C. R., p. 108).

The mistake must be as to a fact of such a nature that the

party could not by reasonable diligence get knowledge of it when put upon inquiry (*Id.*, *opinion* EDWARDS, *J.*).

V. There cannot be a question that parol evidence was admissible to show that the said leases were not regarded by the parties as incumbrances within the meaning of the word incumbrances, as used in the clause of the contract providing that the conveyance was to be free of all incumbrances, except, &c., at the time they executed the contract.

It is a cardinal point in the construction of contracts that the intention of the parties is to be inquired into, and if not forbidden by law is to be effectuated. Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect; and whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties and of the subject-matter of the instrument. To this extent, at least, the well settled rule is that extraneous evidence is admissible to aid in the construction of written contracts (*French* agt. *Carhart*, 1 *Comstock's R.*, p. 102; *Bridger* agt. *Pierson*, 45 *N. Y.*, 604; *Greenleaf's Ev.*, vol. 1, § 286).

VI. Considering the provision of the contract, that the plaintiff was to receive the rents of the premises from the date of the contract, the parol evidence which was admitted and given shows beyond a doubt that the leases which were on the premises at the time the contract was executed were not then regarded by the parties as incumbrances within the meaning of the contract. The contract not only recognizes their existence, but expressly provides that the plaintiff should receive the rents to accrue therefrom from the date of the contract (*Pease* agt. *Christ*, 31 *N. Y. R.*, p. 141, *which is directly in point, and nearly on all fours with this case*).

VII. But if such parol evidence was improperly admitted, we contend, as we claimed on the trial, that the contract itself contains sufficient evidence that the plaintiff, when he signed

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it, had knowledge of leases then existing on these premises, the rent to accrue from which, from the date of the contract, it is therein stipulated should be paid to him.

There would be no meaning in this stipulation unless those leases were to continue in existence to the day appointed for the completion of the sale, and the plaintiff, therefore, had no right to object to any lease existing on the premises on that day, unless it was not in existence on the day of the date of the contract, and the burden of proving that fact was on him.

It was argued, on the other side, that the word "rents," in the contract, was used as a technical term, descriptive of the estate intended to be conveyed, and does not necessarily imply the existence of leases on the premises, the conveyance of real estate with its rents being another way of signifying that the conveyance was to be in fee.

But it must be remembered that this contract was not drawn by counsel learned in the law, but by one of the real estate agents concerned in the sale, and the word "rents," as used by him, is therefore to be interpreted according to its *plain, ordinary and popular sense* (*Per Lord ELLENBOROUGH, Robertson agt. French, 4 East., 135; 1 Bl. Comm., p. 59; Sedg. on Stat. & Cons. Law, p. 236; Chitty on Contracts, p. 80*).

Knowledge of the existence of leases on the premises at the time the contract was made was sufficient to put the plaintiff upon inquiry, and was an implied notice to him of the rights of the tenants thereunder (*See Williamson agt. Brown, 15 N. Y. R., p. 354, which reviews all the cases on this point*).

This rule is that a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him (*Id.; The Kingston Bank agt. Eltinge, 40 N. Y., 396, per HUNT, Ch. Comm.*).

VIII. It follows that the defendants were able, on the said 11th day of February, 1869, to convey to the plaintiff the premises in question, in accordance with their contract, and

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duly offered to perform all the conditions of said contract on their part to be performed. And that, therefore, the plaintiff was not justified in refusing the deed which the defendants then tendered to him.

IX. The subsequent written offer of the plaintiff, made on the 29th April, 1869, was too late, even if it had not been coupled, as it was, with the condition that the premises should be free from all incumbrances except the mortgage provided for in the contract; which was equivalent to saying that the plaintiff still refused to accept the deed if the leases he objected to on the eleventh February, 1869, were still in existence.

X. The plaintiff's refusal on the 11th February, 1869, was absolute and final, unless those leases should be terminated. And if, as we have shown, he had no right to insist on that condition *then*, the defendant, Patrick McDonnell, was justified in renewing the leases, as he thereupon did. He would have been guilty of unheard of folly if, under the circumstances, he had allowed these valuable leases to expire.

XI. The plaintiff has never offered, but, on the contrary, has expressly refused, to accept a deed for the premises in question subject to said leases, and he does not even in this action pray for a specific performance of said contract unless he can get possession of said premises free from such leases.

XII. And under the circumstances of this case he cannot recover back the \$2,000 paid by him on account of the purchase-money (*Ketchum* agt. *Evertson*, 13 *Johns.*, 363; *Stephens* agt. *Beard*, 4 *Wend.*, 605; *Simon* agt. *Kaliske*, 6 *Abbott's P. R.* [N. S.], 224; *Hansbrough* agt. *Peck*, decided in the supreme court of the United States, and reported in the *American Law Register*, new series, vol. 7, p. 77).

XIII. There is nothing in the point attempted to be made by the plaintiff, that the *defendants* have rescinded the contract in question, and that, therefore, upon settled principles of law and equity, he is entitled to recover back the portion of the consideration-money paid by him.

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The only ground on which this is claimed is, that on the 11th July, 1869, the defendant, Patrick McDonnell, told the plaintiff that if he did not accept the deed then tendered him, he might consider the bargain at an end, and afterwards renewed the leases on the premises for the following year. This was a proceeding in affirmance, not in rescission of the contract, by enforcing a right of forfeiture which the law gave him, growing out of said contract, upon the refusal of the plaintiff to accept the deed duly tendered to him under it. This right was just as strong as if it had been expressly reserved in the contract (*See Hansbrough agt. Peck, ut supra; Green agt. Green, 9 Cowen, p. 46; Haynes agt. Hart, 42 Barb., S. C. R., p. 58*).

In this case, JOHNSON, J., says: "I think no case can be found where a purchaser has been allowed to recover back partial payments after default in making further payments when the vendor has merely kept the property agreed to be sold, or *sold it* to another in consequence of such default."

See also *Ketchum agt. Evertson* (13 *John.*, p. 364), in which it was held that the sale of property by the vendor, after the refusal of the vendee to accept a deed thereof in pursuance of his contract, was not a rescission of the contract by the vendor which would entitle the vendee to recover the portion of the purchase-money paid.

SPENCER, J., who delivered the opinion of the court, says: "To say that the subsequent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract, would, in effect, be saying that the defendant could never sell it without subjecting himself to an action by the plaintiffs. The plaintiffs peremptorily refused to fulfill the contract; it was in vain, therefore, to keep the land for them. The plaintiffs cannot by their wrongful act impose upon the defendant the necessity of retaining property when his exigencies may require him to sell."

XIV. Besides, in any aspect of the case, to entitle the plaintiff to recover back the portion of the purchase-money

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paid, he should have tendered the residue of the purchase-money, and demanded a deed, so as to put the defendants in default, which has not been done (*Hudson agt. E. & J. Swift*, 20 *Johns. R.*, p. 26).

XV. This result renders it unnecessary to consider the plaintiff's exception to the exclusion of the testimony offered by him to show that about the months of February and March, 1869, the property in question went up in value and could have been sold at an advance. But it is well settled that only nominal damages are recoverable for the failure by a vendor to perform an executory contract for the conveyance of land made in good faith, and broken without fraud by reason of his inability to make a good title (*See Conger agt. Weaver*, 20 *N. Y. R.*, p. 140; *Pumpelley agt. Phelps*, 40 *id.*, p. 66; *Mack agt. Patchin*, 42 *id.*, p. 172).

XVI. The judgment appealed from should be affirmed, with costs.

By the Court, INGRAHAM, P. J.—The plaintiff had a contract to purchase land of defendant, on which he made a payment. When the time fixed for delivering the deed arrived, the plaintiff objected to take it on account of an incumbrance of an assessment upon the property, but said he was willing to take the same when the defendants could give a deed according to the contract.

The assessment was paid and the deed tendered on the next day. The plaintiff again refused to take the title on account of leases which he said were on the property.

The justice found that such leases were known to plaintiff at the time of the purchase.

The tender of performance by the defendants, and refusal of plaintiff to accept the deed, terminated the contract on the part of the defendants, if there were no incumbrances on the property at the time.

It was not a rescission of the contract on their part, which

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required a repayment of the purchase money to make such rescission valid.

It was a discharge by the plaintiff of the defendants' obligation, and did not entitle him to a repayment of the money paid on making the contract. Any such rule would enable a purchaser on the tender of a deed to refuse to complete his purchase, and then to claim back payment of the amount originally paid to bind the contract.

If neither party seeks to enforce the contract on the day fixed for performance, equity will give relief afterwards; but where the vendor tenders the deed and demands performance on the day, and the vendee refuses, he cannot afterwards seek in equity to be relieved from his own voluntary refusal to perform his contract.

The case of *Ketchum* agt. *Evertson* (13 *J. R.*, 359) is in point, both as to the rights of the plaintiff to have a decree for specific performance or to recover back the money paid by him on account of the contract.

The only inquiry, then, would be whether there was anything in the objection made by the plaintiff as to the leases on the premises until May first ensuing.

The justice found that the plaintiff knew of such leases at the time of making the contract, and they were not considered as incumbrances.

There was no other objection made, and the finding on this point is conclusive against the plaintiff.

We think there is nothing in the exceptions on the trial, and that the judgment should be affirmed.

WM. L. LEARNED and JNO. R. BRADY, JJ., concurred.

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SUPREME COURT.

BENJAMIN F. ALLEN, WILLIAM A. STEPHENS and HERMAN
BLENNERHASSET agt. THE SCANDINAVIAN NATIONAL BANK.

In an action on a bill of exchange against an insolvent national bank of another state, which has funds deposited in a bank in this state, and in which action an attachment is issued on behalf of the plaintiffs and said funds are attached, this court has *jurisdiction* of the action and of the attachment proceedings under it.

The *receiver* of such foreign national bank not being a party to the action, has no *status* which authorizes him to move to set aside the attachment proceedings.

Where the *receiver* of such foreign national bank files a bill in equity in the United States circuit court against the plaintiffs in the attachment suit and the sheriff who served the attachment, and moves the court upon the bill and upon affidavits for an *injunction* to stay all proceedings in the attachment suit and for a *receiver* to take charge of the funds pending the litigation, on the ground that the United States court has exclusive jurisdiction of said insolvent national bank and is entitled through its receiver to the custody and control of the funds so attached, the motion both for the injunction and receiver will be denied.

New York General Term, May, 1873.

Before INGRAHAM, P. J., and BRADY, J.

THIS is an appeal by the above named defendant to the general term of this court from an order of special term entered on the 5th day of March, 1873, denying a motion to vacate and set aside an attachment and order of publication.

The action was commenced by summons and complaint upon a bill of exchange made by the defendant, a corporation located and doing business at the city of Chicago, in the state of Illinois, to the plaintiffs, residents of the city of New York, dated December 9th, 1872, at Chicago, who directed the same to the National Broadway Bank of the city

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of New York, the defendant's corresponding bank, requiring the National Broadway Bank to pay to the order of the plaintiffs the sum of \$650 at sight for value received. The complaint charged that this sum was due and owing the plaintiffs from the defendant, and demanded judgment against the defendant for said sum, with interest from December 9th, 1872. Upon this complaint and affidavits of the plaintiffs, showing that the defendant was a foreign corporation organized under the provisions of the act of congress of the United States, passed June 3d, 1864, and the amendments thereof, doing business at Chicago, Illinois; and that the defendant had property within the state of New York consisting of a sum of money, an attachment was issued on the 12th December, 1872, against the defendant; upon which attachment the sheriff of the city and county of New York attached the funds deposited by the defendant in the Broadway National Bank on the 13th December, 1872. On the 19th December, 1872, an order for the publication of the summons was obtained and its publication immediately thereafter commenced.

The defendant, by the United States district attorney for the southern district of New York, acting for the receiver, before the time to answer expired, upon an affidavit stating that prior to the commencement of this action, on or about December 11th, 1872, the defendant suspended and became insolvent according to the act of congress of June 3d, 1864, and acts amendatory thereof, and on the 18th December, 1872, Jacob D. Harvey was appointed receiver by the comptroller of the currency, applied, as such receiver, to a justice of this court for and obtained an order for the plaintiffs to show cause, at a special term to be held on the third Monday of February, 1873, why the warrant of attachment and proceedings under it should not be set aside, on the ground, among others, that this court has no jurisdiction, and that the continuance of said proceedings in this action, and of said attachment is in violation of said acts of congress; and

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that the attachment was issued after the commission of the act of insolvency by the defendant, and with a view to prevent the application of its assets as prescribed in said acts of congress, and to prefer the plaintiffs in this action by securing to them their claim in full from said assets in preference to other creditors, or the ratable proportion of said assets that might be found due to the plaintiffs under said acts.

On the 5th of March, 1873, the order to show cause was argued before judge FANCHER, who made his decision as follows: "So far as the defendant is concerned, the attachment was properly granted (50 *Barb.*, 339), and the case of *Tracy agt. First National Bank of Selma* (37 *N. Y. R.*, 525) decides that the receiver has no *status* in the action to make a motion to vacate the attachment. The receiver must assert his title in some other manner. Motion denied. From this decision the defendant appealed to the general term.

GEORGE BLISS & H. EDWIN TREMAIN, *attorneys and counsel for defendant and appellant.*

The summons in this action is dated December 12th, 1872, and an attachment was issued December 12th, 1872, against defendant, as a foreign corporation having funds with Broadway National Bank, in New York city.

The moving papers show that the Scandinavian National Bank of Chicago, Illinois, where it carried on business, suspended payment, and that its circulating notes were protested before this action was commenced. The receiver was appointed by the comptroller of the currency, under the banking act of 1864 (13 *U. S. Stat. at Large*, 115), December 12th, 1872.

Plaintiffs attempt by this action to wrest the funds in the Broadway Bank from the receiver's control, to be applied to their alleged debt. Defendant resists; and appears by attorney solely for the purposes of the motion, which resulted

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in the order now appealed from. That order denies defendant's motion to vacate and set aside the summons, warrant of attachment, order of publication, and all proceedings in this action, and to stay it until further order.

This appeal involves, among other things, three questions :

- (1.) The jurisdiction of this court.
- (2.) The right of a state court to seize moneys belonging to an insolvent national bank, or its receiver ; and
- (3.) The right of defendant to make the motion denied at special term.

I. Under sections 8 and 57 of the banking act of 1864 (13 *Stat. at Large*, 99), a national bank can only be sued in a municipal court that acquires jurisdiction within the county or city where the bank is situated (*Richardson on Public Debt and Banking Laws*, pp. 105, 134, 138 ; 13 *U. S. Stat. at Large*, 116, 101).

The decision of INGRAHAM, J., to the contrary was at special term (chambers) of this court, not binding here, and made when the act was (1867) without much judicial construction. The report does not show what argument was made before him (*Cooke agt. State National Bank of Boston*, 50 *Barb.*, 339).

Two years later (1869), the supreme court in Massachusetts, *in banc*, unanimously construed the act of congress to limit the courts having jurisdiction of such corporations to those stated in the act itself (*Crocker agt. Marine National Bank*, 101 *Mass.*, 240).

In 1873, an elaborate opinion was given by BLATCHFORD, J., to same effect (*Cadle, Rec'r, agt. Tracy, etc., U. S. Circuit Court* [not reported]).

The expression in other sections (46 and 50, *U. S. Stat. at Large*, 115), of a court of "competent jurisdiction," is an instance of the evident design of the act to keep matters, arising under it, within the jurisdictions described in the act itself.

The rights and immunities of a corporation, created out of

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this state, are to be determined by the law creating them (*Hope Mutual Insurance Co. agt. Perkins*, 38 N. Y., 407).

The power of congress to make this limitation as to the proper court in which to sue will not be disputed; and were it otherwise, a state court, even at general term, would hesitate to declare to the contrary, unless the act is manifestly unconstitutional, which no one has ever seriously pretended.

II. The Scandinavian Bank has no property in New York state. The funds in the Broadway Bank vest in the receiver, as well from his appointment, as from date of insolvency or suspension (§ 52, 13 *Stat. at Large*, 115).

III. The attempt to bring into this court, by attachment, the funds lately of the Scandinavian Bank, to be held until a determination of the claim of plaintiffs, described in the complaint, and in the end possibly to be appropriated towards the payment of that claim, is in direct violation of law (§ 52).

One cannot be permitted to gain by adverse proceedings, under the guise of law, what the law-making power has declared he shall not gain. "Will the law compel a payment which the law prohibits?" (*Venango National Bank agt. Taylor*, 56 *Penna. R.*, 14).

The transfer of any funds belonging to the insolvent bank, to its creditors, or any other person, is expressly *prohibited*. If these funds can be reached by attachment this law is nullified.

IV. Whether the receiver ought not to be substituted as a defendant, is not necessary to the determination of this motion. Plaintiffs must apply to the court for such a change, if it can be made, and if their summons is not set aside. The objection will then be urged again that the court is without power or jurisdiction, and that another method has been by law provided for the determination and payment of plaintiffs' claim.

Even a payment, by the receiver of a judgment upon an execution in this action, would be without warrant of and against the law, unless all other creditors were also paid in

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full. The law does not permit to be done indirectly what cannot be done directly.

V. The moneys in the National Broadway Bank are, and were, when the summons was issued, as if in the custody of a public officer of the United States, by virtue of his office, and were, therefore, subject only to the authority controlling such public officer. That authority is defined in the act under which the office is created and the officer appointed. That act is law for this court.

(a.) The receiver is a public officer, an officer of the United States, for the purposes named in the act (*Platt, Receiver, agt. Beach, 2 Benedict, 303*).

(b.) The property in the hands of a public officer of the United States, coming to his hands in the exercise of his office, and concerning which the United States has an interest or lien or the legal custody until its claims are satisfied, cannot be reached by attachment (*Conrad agt. Pacific Ins. Co., 6 Peters, 262; Harris agt. Dennie, 3 Pet., 292*).

Property in the hands of one national bank and belonging to another national bank cannot be diverted from its legal channel because not in the manual custody of the home bank. No greater rights can accrue to plaintiffs upon moneys in the hands of the agents of the insolvent bank than would attach to moneys in custody of the insolvent bank itself; especially where the same laws govern all parties in respect to such moneys.

The property is in fact, and to all intents and purposes, *in custodia legis*. It is not, therefore, a proper subject of attachment.

VI. Even if this law regulating these moneys was a mere statute of another state, the "rights and immunities" under it, "so far as they are consistent with our domestic policy and unabridged by our own legislation, are entitled to recognition and protection in the courts of this state" (*Merrick agt. Van Santwood, 34 N. Y., 208*).

The act of congress, however, being of a law-making

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power competent to make law on this subject applicable to New York state, positive enactment is substituted for this well established comity.

VII. Upon the theory that the corporation ceased to exist upon its insolvency, it may be said with propriety that the mere suggestion that there is no such person, individual or corporate, as that named as defendant, is sufficient for the court to vacate its writs issued against such a person or his property. The case is then parallel to the suit against a deceased non-resident. His estate is not liable to attachment, but to the administration thereof provided by law in such cases.

The effects of a deceased person are not liable to attachment (*Redfern* agt. *Rumney*, 1 *Cranch C. C.*, 300; *id.*, 352; 5 *Cranch C. C.*, 469).

VIII. As there can be then no attachment in this case (of funds available to plaintiffs or otherwise), so again is this court without jurisdiction and compelled to set aside all proceedings subsequent to the summons and complaint (*as was done in* 5 *How. Pr.*, 183). They are not only voidable but absolutely null and void (*Singgart* agt. *Harber*, 4 *Scammon*, 37).

Where the exercise of a jurisdiction is in violation of law, and cannot be justified by the submission or consent of the parties, the proceedings are *wholly void* (*Griffin* agt. *Daninquey*, 2 *Duer*, 658; *Case* agt. *Terrell*, 11 *Wallace*, 200).

The result of any proceeding, in an action brought against a foreign corporation without its voluntary appearance (or even after service upon their managing agent under the Code), and where no attachment has been issued and served, is that the courts of New York do not get jurisdiction of the defendant *so as to render a personal judgment*. The extent of their power is to subject the property and effects of such corporation within this state to the payment of its debts, by a judgment *in rem* after such property and effects have been attached under the Code (*Brewster* agt. *Mich. Cent. R. R. Co.*, 5 *How. Pr.*, 183; *Cooper* agt. *Reynolds*, 10 *Wall.*, 308).

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So here this jurisdiction can only be made complete by the enforcement by this court of its attachment against property that, by the "supreme law of the land," cannot be taken into custody for any creditor or other person except the receiver appointed by law. "Jurisdiction has reference to the power of the court over the parties, over the subject-matter, over the *res*, or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make" (*Cooper agt. Reynolds*, 10 *Wall.*, 316).

IX. The subject is brought properly before this court by a motion in defendant's behalf.

The motion is made by defendant.

1. In *Tracy agt. First National Bank of Selma* (37 *N. Y. Rep.*), the court of appeals hold that the receiver has no right to make motion to vacate attachment unless he is made a party; and they do not decide whether he may or may not be made a party; nor do they decide that the motion may not be made by the bank itself.

That our course is proper is now established by the case of *Bank of Bethel agt. Pahquioque Bank* (14 *Wallace*, 383), where United States supreme court hold that an insolvent national bank may appear in court by its name, for the purpose of judicially determining a creditor's claim.

The New York supreme court, in 30 *Barb.*, 160, expressly recognize the principle that a foreign corporation may appear for the purposes of motion only in order to raise jurisdictional questions.

All the questions in this case are of a jurisdictional character.

The jurisdiction of the court and the manner in which it is attempted to be exercised are both called in question.

2. But the receiver is an officer of the United States (*See Platt, Rec'r, agt. Beach*, 2 *Benedict*, 303).

He cannot submit himself as a party defendant to be directed as such an officer to the jurisdiction of this court (*Case agt. Terrell*, 11 *Wallace*, 200).

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The claims of the United States are opposed to those of attaching creditors, and they cannot be disposed of by any judgment of this court—even by the voluntary submission to its jurisdiction by the said receiver or any other United States officer. This doctrine is clearly set forth in *Case agt. Terrell* (11 Wallace, 200).

3. The court must act according to the law as it stands upon the undisputed facts before it—and as though these facts came to its judicial knowledge by way of suggestion, or as from *amicus curiæ*.

This court should vacate the attachment and order of publication, and set aside the summons and all subsequent proceedings.

X. The order appealed from should be reversed with costs, and the proper order made in the premises.

MORRIS & BILLINGS, attorneys.

COLES, MORRIS & MICHAEL H. CARDOZO, *of counsel for plaintiffs and respondents.*

I. There is a preliminary objection to the hearing of this appeal which is fatal.

A motion to dissolve an attachment, like any other motion in a suit, can only be made by a party to the same.

Under sections 121 and 122 of the Code it was competent for the receiver to apply to make himself a party to this action. This he has failed to do.

He is therefore a stranger to the proceedings.

He had no *status* to make the motion at special term; he has none to conduct the appeal to this court.

The case of *Tracy agt. First National Bank of Selma* (37 N. Y. R., p. 523) is directly in point and conclusive.

But, if it be necessary to enter into the argument of this appeal on its merits, we respectfully insist as follows:

II. The supreme court has jurisdiction of this action (*Cooke agt. State National Bank of Boston*, 50 Barb., p. 339).

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III. This action was not brought upon any "*transfer of deposit to the credit of this bank*," but upon a bill of exchange which is payable *absolutely and at all events*.

It is abundantly settled that a draft, not *specifically* drawn on a fund, does not operate as an *assignment* of any part of it, nor constitute an equitable lien thereon (*Harris agt. Clark*, 3 *N. Y. R.*, p. 93; *Copperthwaithe agt. Sheffield*, *id.*, p. 243; *Winter agt. Drury*, 5 *id.*, p. 525; *Chapman agt. White*, 6 *id.* p. 402).

IV. There are no express words in the act with reference to which this motion is made, to make the attachment in this action *void*, and the court will not *unnecessarily* give such a construction to it (*Sedgwick on Statutory and Constitutional Law*, pp. 308 and 310).

V. In the bankrupt act of 1867, it is *expressly* provided that all attachments obtained within four months next preceding the commencement of the proceedings, &c., shall be dissolved. The inference is that no *such construction* could be given to the act in the *absence of such express provisions*. Indeed, it has been expressly held that, under the bankrupt act of 1841, which did not contain such a provision, all *liens* which were valid by the laws of the states respectively were preserved (*Wooten agt. Clark*, 23 *Miss.*, 1 *Cush.*, 75).

VI. The mere act of insolvency did not have the effect of *divesting* the bank of its property.

Under section 47 of the act, the act complained of is to be *ascertained* by an agent to be appointed by the comptroller, with the concurrence of the secretary of the treasury.

Under section 50, upon becoming *satisfied* that an act of insolvency has been committed by the bank, the comptroller then appoints a receiver, *who is to give security*; and the receiver so appointed is to take *possession* of the property of the bank.

And *even after the appointment* of the receiver the bank may, upon denying that it is insolvent, have further proceedings in the matter restrained, and the court may make an

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order enjoining the comptroller, and any *receiver* acting under his direction, from all further proceedings on account of the alleged act of insolvency (*Id.*).

All these proceedings may precede the actual *dissolution* of the bank; and if the investigation under them proves favorable to it the dissolution does not take place.

Again, it is provided by section 46, that even "after default by the bank, on examination of the facts by the comptroller, and notice by him to the bank," the bank may still *receive* and safely keep *money belonging* to it.

VII. The insolvent bank does not become *divested* of its property until the appointment of a receiver *competent* to take possession of it.

VIII. The receiver appointed in this matter, on 12th December, 1872, was *not* competent to take possession of the property of the bank, because he failed to give the requisite security.

IX. There was *no competent* receiver *appointed* until 18th December, 1872; and the attachment in this action was served on the Broadway Bank on 13th December, 1872 (*see affidavit of H. Blennerhasset and letter of comptroller thereto annexed*).

X. The rule which was laid down by justice STORY in *ex parte Foster* (5 *Law R.*, p. 55), that when the decree in bankruptcy is passed, it relates back, for all the purposes of the act, to the time of the petition, has never been universally adopted (*see Miller agt. Black*, 1 *Barr*, *Penn. Rep.*, p. 420), in which it was held that the levy of a judgment creditor, under execution upon the property of a bankrupt after the filing of his petition and before a decree, was prior and superior to that of the assignee in bankruptcy (*see, also, Berthelon agt. Betts*, 4 *Hill*, 577; *Drake on Attachment*, § 435).

XI. The court in the case of the *Venango Bank agt. Taylor* (56 *Penn. S. R.*, p. 14), which is relied on by the receiver in this case, expressly concede "that there is nothing in the act in question which declares that the assets of a

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bank vest in the receiver immediately from and after an act of insolvency, or that the appointment of the receiver relates back to such act," and adds: "But the difficulty of the defendant does not lie *here*, but in the *prohibition* of any *transfer* of the assets until a receiver has been appointed." The facts in that case were, that Taylor, the defendant, owed the bank \$50,000. A certain Rynd had a deposit there of \$44,000, which he assigned to Taylor *after the bank had stopped payment*. The decision was that this assignment was *void by the express terms of the act*, and that Taylor could not, *therefore*, offset it against his indebtedness to the bank. It is true that the judge, who delivered the opinion of the court in that case, goes on to say that he had no doubt "that the purpose of congress was to secure all the assets of the bank existing at the time of its act of insolvency for ratable distribution;" but all this is clearly an *obiter dictum*. In fact, the decision in that case can be fully sustained on general principles applicable to bankrupt acts, without reference to the special provisions of this act.

See *Smith agt. Brinkerhoff* (8 Barb. S. C. R., p. 520), in which it was held that where, after a creditor has filed his petition in bankruptcy, a debtor, with full knowledge of the fact, purchases a debt against him, he cannot set it off in an action brought by the assignee in bankruptcy to recover the original indebtedness.

With all deference to the *extra-judicial* opinion of the learned court in the case of the *Venango Bank agt. Taylor*, above referred to, we submit that there is nothing in the act in question which renders it *necessary* for this court to give it a harsher operation than has been sanctioned in the construction of ordinary bankrupt acts; and that if any *uncalled* for construction of this act is to be given it should be rather in favor than against the rights of innocent creditors.

XII. The order should be affirmed, with costs.

The general term affirmed the order of the special term. No written opinion being given; but judge INGRAHAM said,

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that on the merits they were satisfied that the attachment was properly granted.

On the 24th of June, 1873, the receiver of the Scandinavian Bank, by George Bliss, his solicitor, filed his bill in equity in the United States circuit court for the southern district of New York in the following entitled cause:

UNITED STATES CIRCUIT COURT—SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

J. D. HARVEY, Receiver of the Scandinavian
National Bank of Chicago, *Plaintiff*,

against

BENJAMIN F. ALLEN, WILLIAM A. STEPHENS,
HERMAN BLENNERHASSET, THE NATIONAL
BROADWAY BANK, and MATTHEW T. BRENNAN,
Sheriff of the City and County of New
York, *Defendants*.

Which bill, in its stating part, set forth substantially the same facts as contained in the papers used by the plaintiff herein on his motion to set aside the attachment proceedings in the action in the supreme court above mentioned; and alleged that the defendant, the Broadway National Bank, at the time of the insolvency of the Scandinavian National Bank, December 11, 1872, had in its possession \$1,500, more or less, which the plaintiff, as receiver, and in behalf of the comptroller of the currency, was entitled to demand, and of said sum to receive manual custody, that the same might be paid into the United States treasury; which demand and custody the National Broadway Bank had refused, on the ground that a part of said fund was held by the sheriff of New York by virtue of a warrant of attachment in favor of the defendants; and the plaintiff charged that, by such attachment, and proceedings under it, he was subjected and

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annoyed with unjust, unnecessary, oppressive and vexatious litigation, and prevented thereby from the discharge of the duties of his said office as receiver; prayed for an injunction, restraining the National Broadway Bank from paying over said moneys to any person except the complainant, and for a stay of all further proceedings in the attachment suit; and also prayed for a receiver to take possession of said fund pending this action. On the 25th June, 1873, upon the bill of complaint and papers filed and served in said action, the plaintiff's solicitor obtained from judge BLATCHFORD an order, for the defendants to show cause on the 28th June, 1873, why an injunction should not issue, and a receiver be appointed, in accordance with the prayer of the complaint. Upon the motion to show cause why an injunction should not issue, the defendants argued as follows:

MICHAEL H. CARDOZO, *for defendants.*

I. The United States circuit court has no power to stay the proceedings in an action pending in the state court. It cannot accomplish this by its writ of injunction.

The act of congress of March 2d, 1793, prohibits the United States courts from granting a writ of injunction to stay proceedings in any court of a state (*U. S. Stat. at Large*, 355).

(a.) This statute has repeatedly received a judicial construction in the supreme court of the United States, as well as in the circuit courts thereof, and it has been uniformly decided that the power here sought to be invoked does not exist (*Diggs* agt. *Wolcott*, 4 *Cr.*, 179; *Peck* agt. *Jenness*, 7 *How.*, 612; *Colby* agt. *Ledder*, *id.*, 626; *Taylor* agt. *Carryll*, 20 *How.*, 597; *Johnson* agt. *Bishop*, 1 *Woolworth*, 324; *Atkinson* agt. *Purdy*, *Crabbe*, 656; *City Bank of New York* agt. *Skelton*, 2 *Blatchf.*, 26; *Ex parte Cabrera*, 1 *Wash.*, 232; see also 10th *National Bank* agt. *Sanger*, 42 *How. R.*, 179).

(b.) The fact that the injunction issues only to the parties before the court and not to the court itself, is immaterial. It is no evasion of the difficulties that are the necessary result of

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an attempt to exercise this power over a party who is a litigant in another and independent forum (*Kennedy* agt. *The Earl of Cassilis*, per lord ELDON, 2 Swans.; *Peck* agt. *Jenness*, 7 How., 625).

(c.) Both tribunals are in general of concurrent and coextensive power and authority. Neither the one nor the other can, under any guise, directly or indirectly, enjoin the proceedings of the other. Only a higher court of the state or nation can decide either to be wrong (*Johnson* agt. *Bishop*, 1 Woolworth, 324; *Peck* agt. *Jenness*, 7 How., 612).

II. The supreme court of the state of New York has jurisdiction of an action brought therein by one of its citizens against a corporation organized under the banking act of 1864, and carrying on business at Chicago, Illinois (13 U. S. *Stats. at Large*, p. 99).

(a.) The power conferred by section 57 of bringing actions against these associations in certain specified courts is permissive, not mandatory.

(b.) There are no words of exclusion in the act; and it is a general rule as to jurisdiction, that, to confer it upon one court, does not operate to oust other courts before possessing it.

(c.) The provision relative to state courts was only inserted to prevent an inference that might arise that jurisdiction was intended to be restricted to the United States courts.

(d.) The construction contended for by the receiver, if adopted, would work great inconvenience, and enable these associations to delay and defraud creditors.

(e.) Congress had no power to deprive the state courts of jurisdiction in all suits against these banking associations (*Pitt Cooke* agt. *State National Bank of Boston*, 50 Barb. S. C. R. P., 339; S. C., in court of appeals, MS. opinion of CHURCH, Ch. J.).

III. The preliminary injunction should be dissolved.

Upon the motion for the appointment of a receiver, the complainant argued as follows:

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H. EDWIN TREMAIN, *for complainant.*

This is a motion for the appointment of a receiver to take charge of the fund in controversy in this action, until its final determination.

The motion is made by the complainant on notice to the Broadway Bank, the sheriff and Allen, an alleged attaching creditor, all defendants, resisting it.

The fund in question is now in possession of the Broadway Bank, from whom it is claimed by Allen, and in his behalf by the sheriff, and by the complainant as receiver of the Scandinavian Bank, of Chicago, to whom unquestionably the deposit did belong.

The Broadway Bank claims to be a mere stakeholder. If so, it can make no meritorious objection to the granting of the motion, unless its rights would thereby be prejudiced.

The Broadway Bank being a codefendant in this suit, brought to determine conflicting claims to the same fund, all the claimants to which are before the court, can in no wise be prejudiced by the care and distribution of the fund in this suit.

A final decree in this suit will protect the bank and inure to its benefit, and an interlocutory custody by the court of the property in controversy will have the same effect.

Without this, there being no injunction against the defendants pursuing their claims in other courts, the Broadway Bank is liable to the embarrassment of other litigation for the same fund.

It would be the interest of the sheriff so to pursue the bank in case the defendant, Allen, should seek to hold the sheriff. All such controversies would be *quieted* by the care of the fund in question by this court until a final decree.

Unless a receiver be appointed, the fund is exposed to the attacks of the defendant, Allen, in his attempt to remove it beyond the jurisdiction of the court. The moving papers show such an attempt under color of authority.

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The question, then, arises: Does the exercise of the pretended authority, under color of an unwarrantable claim of jurisdiction, endanger the fund or any part of it; or the rights of the complainant to it, in case such rights exist, as alleged in the bill of complaint?

Most unquestionably, yes.

Aside from the diminution the fund would thus suffer, new claims could be made upon it that might prevent the decree of this court in this action from being of the same practical value to the complainant, if he succeeds, that it would have if the fund remained in *statu quo*.

But it is urged that the fund is already in the custody of the state court.

This is a misapprehension. It is merely *claimed* by sheriff by virtue of an attachment issued by a court which this court has held is without jurisdiction in the premises.

The sheriff has served an attachment on the Broadway Bank. The deposit is confessedly the property of the Scandinavian Bank. These facts do not place the fund in the custody of the state court or its officers. Even if they did, the attachment being without jurisdiction, and not yet followed by a final judgment under a claim of jurisdiction, there can be no such conflict between the state and the United States court as is attempted to be foreshadowed in opposing this motion.

As to the question of jurisdiction of the state court, that has been already discussed on a prior motion in this case.

The complainant claims the supreme court has no jurisdiction.

The power of this court to appoint a receiver is not doubted. To exercise it in this case is to preserve existing equities, to prevent multifarious litigation, and to secure the fund intact for any decree that may be rendered herein.

All the claimants to it can be protected in no other way until this suit is determined.

Under no consideration can it be properly assumed that the fund in question had been placed within the control, or at

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the order, or in the keeping of the state court, prior to this suit.

To a part of the fund no claim adverse to complainant's is set up, and as to \$600 thereof it is not in the custody of the sheriff, who should have it if the attachment confessedly operated on the bank as a divesture of title.

The mere certificate by the cashier, even though statutory, is not an absolute transfer of the fund into the supreme court.

But the certificate, in fact, is made subject to the rights of the comptroller of the currency, and, therefore, of the receiver (*See certif., p. 10, § 39, of the case of Allen agt. Scandinavian Bank, with papers, printed*).

The Broadway Bank expressly certifies that the funds of the Scandinavian Bank have been taken in charge of the comptroller, but, nevertheless, the Broadway Bank will retain \$600 thereof, because of said attachment, until it is "*legally divested of the same*."

The claim of the state court through the alleged attachment has not yet generated into an absolute control of the fund in question.

The pretense that this motion is to transfer moneys from the state court to the custody of this court, finds no warrant in the papers before the court on this motion, or the facts of the case.

The complainant is entitled to a receiver until the final decree in this suit.

MICHAEL H. CARDOZO, *for defendants*.

I. This suit was instituted without necessity, and is an attempt at an original and bold experiment, sanctioned by no precedent and sustained by no authority.

(a.) The plaintiff herein might have made himself a party to the action pending in the supreme court of this state, between this defendant Allen and others, and the bank, of which the plaintiff has been appointed the receiver (*Code, §§*

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121 and 122; Tracy agt. *First National Bank of Selma*, 37 N. Y. R., p. 523, per WARD HUNT, Ch. J.). There is no question raised by the bill in this suit which cannot be determined in that action; and if the state court should fail to recognize the legal rights of the receiver, a presumption not here to be indulged, he could, in the proper mode, bring the case from the highest court of the state to the highest court of the United States; the fund in dispute *remaining in the meantime* in the Broadway Bank, in whose hands it has been attached (*Johnson agt. Bishop*, 1 Woolworth U. S. Cir. Ct. R., p., 324; per Mr. justice MILLER).

(b.) The books are full of cases in which property, *actually in the possession* of United States officers, has been replevied under authority of the state courts; and in *no* such case has the aid of a United States court ever been granted to resist or impede in any way the action of the state court, although in many such cases, as afterwards determined therein by the supreme court of the United States, the state court has acted wholly *without jurisdiction* (*Freeman agt. Howe et al.*, 24 How. U. S. R., p. 450; *Buck agt. Colbath*, 3 Wallace U. S. R., p. 334; *Taylor et al. agt. Carryl*, 20 How. U. S. R., p. 583). It has ever been the proper aim and desire of all admirers of our peculiar judiciary system, and of all in any way connected therewith, to avoid anything like an unseemly conflict or clashing of authority. Even where the power to interfere is undoubted, not only comity but public policy forbids its exercise (*Atkinson agt. Purdy, Crabbe U. S. R.*, p. 556; *Mead agt. Merritt*, 2 Paige's Ch. R., p. 402; WALWORTH, Ch.).

II. If the foregoing considerations, supported by the authorities cited, do not afford an absolute *defense* to this suit, they, at least, show good cause why the plaintiff's motion for a receiver should not be granted.

(a.) The aid of the state court was first invoked in this controversy, and the subject-matter thereof was, before the commencement of this suit, in the actual custody and control

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of the state court, and of its officer, the sheriff, under the writ of attachment issued by it, and served on the Broadway Bank (*Freeman* agt. *Howe*, *ut supra*; *Taylor* agt. *Carryl*, *ut supra*; *Buck* agt. *Colbath*, 3 *Wallace U. S. R.*, p. 341; *Hogan* agt. *Lucas*, 10 *Peters U. S. R.*, p. 400).

(b.) It makes no difference that, in the opinion of this court, the state court had no jurisdiction of the action in which the attachment was issued. The court of appeals of this state has unanimously sustained such jurisdiction; and the Broadway Bank cannot, therefore, pay over this money to any receiver appointed by this court without rendering itself liable to the sheriff, who would be liable to us if the judgment of the state court should be in our favor. It is not at all likely, under these circumstances, that the bank will give up the control of this fund upon the order of this court, *without compulsion*. Forcible measures on the part of this court may be, and, undoubtedly, will be resisted under the protection of the state court, which is *bound* to exert every legal means in its power for that purpose; the more so that, in consequence of the smallness of the amount involved in this controversy, there can be no appeal from the final decision of this court in this suit.

(c.) All these embarrassments and evils may be avoided without danger to the fund, or impairment of any right the plaintiff may have thereto, by a strict adherence to the doctrine and policy proclaimed by the authorities above cited; leaving all the questions raised in this suit to be finally determined, in the action pending in the state court, by the supreme court of the United States.

(d.) It is difficult to perceive the force of the argument of the plaintiff's counsel, that the exercise by this court of its power to appoint a receiver in this case will "prevent multifarious litigation," or "protect" the fund in question from diminution. It would clearly have the contrary effect in both particulars, giving rise to unnecessary litigation; the cost of which would be chargeable on this fund.

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III. But, independent of the foregoing consideration, we submit,

First, That the statute forbidding the United States courts to issue an injunction, restraining proceedings in a state court, is applicable to this case (1 *U. S. Statute at Large*, 335; *Diggs* agt. *Wolcott*, 4 *Cranch U. S. R.*, p. 119; *Peck* agt. *Jenness*, 7 *How. U. S. R.*, p. 612; *Colby* agt. *Ledder*, *id.*, 626; *Taylor* agt. *Carryl*, *ubi supra*; *Johnson* agt. *Bishop*, *ubi supra*; *Atkinson* agt. *Purdy*, *ut supra*; *City Bank of New York* agt. *Skelton*, 2 *Blatchf.*, 26; *Ex parte Cabrera*, 1 *Wash. U. S. Cir. Ct. R.*, p. 252). The fact that the injunction issues only to the parties before the court, and not to the court itself, is immaterial. It is no evasion of the difficulties that are the necessary result of an attempt to exercise this power over a party who is a litigant in another and independent forum (*Kennedy* agt. *The Earl of Cassilis*, *per lord ELDON*, 2 *Swan's Ch.*; *Peck* agt. *Jenness*, *ubi supra*). Receiverships are in effect injunctions, and something more stringent still (*Patten* agt. *Accessory Transit Co.*, 4 *Abbott Pr. R. [O. S.]*, p. 235).

Second. That in view of the recent unanimous decision of the court of appeals of this state, sustaining the jurisdiction of our state court in actions under the United States banking act of 1864, the question of the jurisdiction of the state court is, at least, sufficiently *doubtful* to prevent this court from granting the plaintiff's motion, either for a preliminary injunction or for the appointment of a receiver (*see case of Cooke* agt. *State National Bank of Boston*, in *N. Y. court of appeals*; *Woodward* agt. *Harris*, 2 *Barb. S. C. R.*, p. 443; *Ramsey* agt. *Erie Railway Co.*, 7 *Abb. Pr. R. [N. S.]*, p. 187).

Third. That in no case will the court appoint a receiver unless it appears by affidavit not only that the property to be preserved is in *imminent danger*, but that the party in possession of it is *irresponsible* (*Kerr on Receivers*, p. 8, and *authorities cited in note 2*).

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Fourth. That the Broadway Bank is more responsible than a receiver would be; and that the danger suggested by the plaintiff's counsel might have been avoided entirely by the plaintiff's sinking his dignity as an officer of the United States, and becoming a party to the action in the state court in which the warrant of attachment was issued.

IV. The preliminary injunction should be dissolved, and the motion for a receiver denied.

BROWN, HALL & VANDERPOEL, *attorneys, and*
J. STERLING SMITH, *counsel for defendants* M. T. BRENNAN, *sheriff, and* BROADWAY NATIONAL BANK.

The subject-matter of this motion is certain moneys now in the custody of the state court, under and by virtue of its writ of attachment, duly issued, in a suit which was pending in that court before the commencement of this action.

The motion is to transfer said moneys from said state court to the custody of this court, by appointing a receiver of the same in this action.

Two questions arise:

1st. As to the power of this court to make such transfer of said moneys.

2d. If the court has the power, is there any cause shown calling for the exercise of such power.

First. This motion is to be determined by the ordinary rules of law and practice in equity. The extraordinary powers conferred by the bankrupt act have no application in this proceeding, because this is not a cause of action or proceeding arising under said bankrupt act.

The statute forbidding the United States courts to issue an injunction restraining proceedings in a state court, is applicable and in force (1 *Stat. at Large*, 334).

Also, the well-established rule of law, that when the state court first obtains jurisdiction of a matter where the jurisdiction of the two courts is concurrent, the United States court cannot interfere (*Buck agt. Colbath* 3 *Wallace*, 334).

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“Where either court is in the possession of the *res* sought to be reached, the process of the other must pause until that possession has terminated” (*Amy agt. Supervisors*, 11 *Wallace*, 138).

The provision of the banking act gives the state courts concurrent jurisdiction of proceedings against banks authorized thereby (*Bank act of 1864*, § 8).

If, therefore, the state court cannot be ousted of its jurisdiction by this court nor enjoined in its action, the subject-matter of the controversy which is in the custody of the state court cannot be taken from it by any order in this action.

Second. If the court has the power to appoint a receiver, there is no occasion for exercising such power.

The money is safe where it is.

The bank, which is the custodian of the fund, is more responsible than a receiver would be, and must respond to any judgment finally rendered against it herein.

Third. If the suit in the state court should result in a judgment in favor of the plaintiff therein, the sheriff would be responsible to the said plaintiff, and the Broadway Bank to the sheriff for the said moneys to satisfy said judgment.

To take said moneys from the said Broadway Bank without first relieving it from all liability under said attachment, would be exposing the bank to the contingency of again paying said moneys to the sheriff.

On the 2d of September, 1873, judge BLATCHFORD denied both motions—for an injunction and a receiver. No written opinion being given.

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SUPREME COURT.

ULREKA LANZ and others, agt. JOSEPH TROUT.

In an action at *law*, where an *equitable defense* is interposed, and judgment is ordered for the defendant on such defense, *without costs* to either party, upon which *order* the defendant enters judgment with taxed costs, a motion, by the plaintiffs, to strike out such costs will be denied.

It being an action at law, the court or referee has no discretion as to which party shall have costs; the Code governs the costs and the right to costs.

Oneida Special Term, October, 1873.

THIS was an action brought to recover the possession of real estate, and the defendant interposed an equitable defense, and the issues were referred to Hon. Charles Mason, who reported against the plaintiffs, or, in other words, in favor of the equitable defense, and directed that neither party should recover costs.

The defendant taxed his costs and entered judgment therefor, from which the plaintiffs brought an appeal, and then served a notice that they abandoned the appeal; but defendant went on with the appeal and took an order affirming the judgment.

The plaintiffs moved, before the appeal was heard, to strike out the costs taxed in favor of the defendant. That motion was ordered to be heard at this term.

G. C. CARTER, *for motion*.JOEL WILLARD, *opposed*.

HARDIN, J.—This motion presents the question, has a referee or court any discretion as to costs in an action of this character, or, in other words, when a law action is stated in a

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complaint and an equitable defense in the answer, upon the defendants prevailing, can the court direct as to costs, or shall the prevailing party be allowed costs in virtue of the statutory provisions as to costs?

That question has been passed upon in this district and the discretion denied, and ~~the~~ statute held to govern.

Judge MORGAN says, in delivering the opinion of the court in *Cythe agt. La Fontain*: "The Code has not made any provision in such a case authorizing the court to deal with the question of costs, but the costs are chargeable to the plaintiff" * * (51 *Barb.*, 195; *General Term*, January, 1868; see also *Bradley agt. Aldrich*, 40 *N. Y.*, 509).

It was held in *Townsend agt. Hendricks* (40 *Howard*, 164) that an action, not in its nature referable, cannot be rendered so by an answer setting up a counter-claim, rendering the examination of a long account necessary (*See opinion of RAPALLO, J.*).

That case seems to treat the complaint as the proper pleading, from which to determine the nature or character of the action.

It must be held, in accordance with the cases cited, that this was a law action, and one named in sections of the Code governing costs and the right to costs, and that the referee or court had no discretion in respect to which party should have costs.

That was settled by the statute, and the recovery by the defendant or the defeat of the plaintiffs.

It was held in *Chapell agt. Churchill* (12 *How.*, 367) that such erroneous direction could not be disregarded by the clerk, and the costs were stricken out; but, upon another motion, the same learned judge allowed an order amending the judgment so as to allow costs to the plaintiff and appellant.

But since that case was disposed of, this court, at a general term in this department, in *Hees agt. Nellis, adm'r, &c.* (1 *vol. Sup. Court Repts.*, *Thompson agt. Cook*, p. 121), has held

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that where a party was clearly entitled to costs, a judgment entered for costs would not be set aside, though the established practice would have required the party entering such judgment for costs to apply, on motion, for an order allowing costs.

The principle of that case is controlling here, and, therefore, the judgment, so far as it gives costs to the defendant, must be permitted to stand.

It is not necessary to pass upon the effect of the appeal and the order of affirmance of the judgment entered. The same result is reached in this case, if it be assumed that the appeal was abandoned, or if it be assumed that the general term affirmed the judgment as entered.

The motion to set aside so much of the judgment as awards costs to the defendant must be denied, with ten dollars costs.

Hines agt. Strong.

SUPREME COURT.

ALBERT E. HINES, respondent, agt. CHARLES W. STRONG,
appellant.

Where the plaintiff, in an action to recover the value of a watch, testifies on the trial to a state of facts tending to show that the watch was pledged to defendant for a loan of money, but in such a contradictory manner that the jury would have been authorized to find that the watch was sold to the defendant, as defendant's evidence tended to prove, and not pledged for a loan of money, as claimed by the plaintiff, and the jury find a verdict for the plaintiff, this court, on appeal, will not disturb the verdict.

Where, on a pledge of property for a certain sum of money borrowed, it is agreed by the pledgor to pay a certain sum as a bonus for the use of the money, a tender of the principal sum with the amount of the bonus, without interest, is a sufficient tender to redeem. In the absence of any agreement to pay interest, the amount of the bonus must be considered to be in lieu thereof.

Fourth Department, General Term, May, 1873.

Before MULLIN, P. J., TALCOTT and E. DARWIN SMITH,
JJ.

APPEAL from a judgment for plaintiff at special term.

FULLER, VANN & BROOKS, *for defendant and appellant.*

The plaintiff was the owner of a gold watch worth \$125, and, desiring to raise money on it, applied to the defendant to advance him a certain sum thereon.

The defendant let him have eighty-two dollars, and took the watch with the understanding that the plaintiff might have it back again upon paying eighty-seven dollars, within thirty days, after which time the watch was to belong to the defendant.

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The plaintiff at first testified to a different arrangement, but finally assented to the above as the truth.

After the expiration of the time within which the eighty-seven dollars was to be paid, according to the agreement, the plaintiff tendered that sum *without interest* and demanded the watch of the defendant.

The defendant refused to accept the money and did not give up the watch, whereupon the plaintiff sued him for converting the same to his own use.

The court allowed the jury to find whether the transaction was a loan or a conditional sale, and they found for the plaintiff upon that point.

The case was then reserved for future consideration, with leave to the defendant to move for a nonsuit or for a new trial, which motion, upon being made, was denied and judgment was thereupon ordered in favor of the plaintiff.

The defendant appealed from the order denying his motion for a nonsuit and for a new trial and directing judgment for the plaintiff as well as from the judgment entered thereon.

The chief question in the case is whether the agreement between the parties in relation to the watch was a pledge, as claimed by the plaintiff, or a conditional sale, or mortgage, as claimed by the defendant.

I. The parties agreed that if the plaintiff failed to pay the specified sum within the specified time, the defendant was to have the watch (*See the testimony of Strong and Van Husen, which was not contradicted*).

See statement of the plaintiff. No other witness was sworn upon the subject of the agreement.

The plaintiff is bound by the statement which he admitted to be true.

II. The effect of this agreement was, upon the failure of the plaintiff to redeem within the specified time, to vest the legal title to the watch in the defendant.

This follows, unless the agreement amounted to nothing more than a simple pledge. If it was a mortgage or condi-

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tional sale, then the plaintiff has no remedy at law, and he should have sought relief in equity.

III. A pledge consists of a delivery of goods by a debtor to his creditor, to be held until the debt or obligation is discharged, and then to be redelivered to the pledgor; the title not being changed during the continuance of the pledge (*Parshall* agt. *Eggart*, 52 *Barb.*, 367-374; *Story on Bailments*, § 286, 2d ed.).

A pledge is a delivery of goods by a debtor to his creditor, to be kept till the debt is discharged (*Markham* agt. *Jaudon*, 41 *N. Y.*, 235-241; 2 *Kent*, 577; *Jones on Bailm.*, 117; *Bow. Inst.*, 419-242).

From these definitions, it is seen that in the contract of pledge the conditions are: (1) the property must be delivered; (2) it must be held until the debt is paid; (3) it must be redelivered on payment of the debt.

There are no conditions involving a forfeiture. There is no changing of the title. There is no conflict between the principles here maintained and the opinion of the court in *Wilson* agt. *Little* (2 *Comstock*, 443, at page 447) when carefully compared.

IV. A chattel mortgage is a sale, conveying the title of the property to the mortgagee with terms of *defeasance*, and if the terms of redemption are not complied with, then, at law, the title becomes *absolute* in the mortgagee.

The nature of the *agreement* must be such that by the mere non-performance of the conditions by the mortgagor, the title will vest in the mortgagee *by the force of the agreement* (*Parshall* agt. *Eggart*, 52 *Barb.*, 371; *Langdon* agt. *Buel*, 9 *Wend.*, 83; *Brownell* agt. *Hawkins*, 4 *Barb.*, 491-493; *Brown* agt. *Bement & Strong*, 8 *Johns.*, 96; *Woodworth* agt. *Morris*, 56 *Barb.*, 9).

V. A pawnee does not acquire title to the property simply by the pawnor failing to pay the debt at the time specified.

The pawnor's rights under the contract must be foreclosed; until then there is no forfeiture (*Brownell* agt. *Hawkins*, 4 *Barb.*, 493, and cases cited).

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A mortgagee *by his agreement* acquires title to the thing mortgaged, subject only to right of the mortgagor to redeem by complying with an express condition, the time being specified, and a failure on the part of the mortgagor to comply with the conditions of his contract, *by force of the contract*, transfers the title absolutely to the mortgagee. The authorities make the distinction exceedingly clear.

VI. The *agreement*, as stated by the plaintiff himself on the witness stand, was as follows :

“ The agreement was, I was to redeem it in sixty days, and if not redeemed in that time by paying eighty-seven dollars, *he was to have it.*”

This agreement has every attribute of a chattel mortgage. The title passed to the mortgagee, subject only to the right of the mortgagor to redeem within the time specified. Failing to *redeem*, the title vested absolutely in the mortgagee, *by force of the agreement.*

The transaction cannot be called a contract of pledge, without ignoring entirely the *agreement itself*, and the *intent* of the parties, if *any* intent is to be gathered from the agreement.

VII. If the court finds the agreement in question to be a *pledge*, in that case the plaintiff is not entitled to recover

To entitle a pledgor to a return of his property, he must make a tender that covers both principal and *interest* (*Woodworth* agt. *Morris*, 56 *Barb.*, 97).

No tender was made in this case, covering the principal and the interest, hence the plaintiff was not entitled to a return of the property.

VIII. The order and judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

GOTT & GARFIELD, *for plaintiff and respondent.*

This action is brought to recover the value of a watch, alleged to have been unlawfully converted by the defendant.

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The answer is the general issue.

Upon the trial the plaintiff gave evidence tending to show that some time during the summer of 1871 he purchased the watch in question of Dennis Valentine, a jeweler at Syracuse; that afterwards he pawned it to Mr. Blair; and while it was in Blair's possession plaintiff procured one Van Heusen to take it from pawn, he (Van Heusen) to advance eighty-two dollars, and take the watch and hold it as security until payment of the sum advanced. After Van Heusen advanced the money and took the watch, plaintiff procured the defendant to advance the eighty-two dollars, and take the watch and hold it as security until repayment of the sum advanced, together with the sum of five dollars. This loan was to be repaid in thirty or sixty days. Before the expiration of the time agreed on, the plaintiff went to the defendant and procured him to agree to extend the time of payment for a few days. The next day, after the extension was granted, plaintiff went and procured one Hayden to go with him to defendant and advance the money to take the watch out of pawn. The defendant was absent; upon his return the money was tendered, the watch demanded, and the defendant refused to accept the money or surrender the watch. The same money was kept and paid into court on the trial.

The defendant gave evidence tending to show that he bought the watch absolutely, with an agreement, also, that plaintiff might repurchase within thirty days, and that plaintiff did not repurchase.

The watch was agreed to be worth \$125.

Upon these facts the court declined to nonsuit the plaintiff, and submitted the case to the jury, with instructions that if they should find the transaction to have been a loan of money by defendant to plaintiff, and the taking of the watch as security for its repayment, then they should find a verdict in favor of the plaintiff. That if they should find the transaction between the plaintiff and defendant to have been an absolute sale of the watch, coupled with an agree-

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ment to resell, then they should find a verdict for the defendant.

The jury found a verdict in favor of the plaintiff.

Judgment having been suspended, with liberty to the plaintiff to move at special term for judgment, upon such application being made, judgment was ordered in favor of plaintiff; and from the judgment the defendant has appealed to this court.

I. The transaction between the plaintiff and defendant was a pawn or pledge, and not a mortgage of the watch (*Brownell agt. Hawkins*, 4 *Barb.*, 491; *Hasbrouck agt. Vandervoort*, 4 *Sand.*, 74; *Wilson agt. Little*, 2 *Coms.*, 443; *Reeves agt. Coppen*, 5 *Bing. N. C.*, 142).

II. The extension of the time within which the plaintiff might pay the sum loaned was valid.

III. Even though there was a failure to pay within the time provided for by the agreement, still the defendant acquired no greater interest in the watch than he before had; and this was merely a special property to retain the goods for his security. There can be no forfeiture until the pawnor's rights are foreclosed (*Brownell agt. Hawkins*, 4 *Barb.*, 492; *note Smith's Leading Cases*, vol. 1, p. 360, ed. of 1866).

IV. Trover lies against a pledgee of property, who, upon tender of the sum loaned, refuses to redeliver (*Brownell agt. Hawkins*, 4 *Barb.*, 492; *note Smith's Leading Cases*, vol. 1, p. 352, ed. of 1866).

V. An action in equity, to redeem the thing pawned, will not lie, unless there are some special circumstances or facts existing which render it necessary to take an account (*Hasbrouck agt. Vandervoort*, 4 *Sand.*, 74).

Equitable jurisdiction is maintained when the plaintiff seeks a redelivery of the precise thing pledged. But when, as in this case, the plaintiff only demands compensation in damages for a failure or refusal to deliver, the remedy at law is adequate (*Wilson agt. Little*, 2 *Coms.*, 443; *Allen agt. Dykers*, 3 *Hill*, 593).

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By non-payment of a mortgage at the day, the mortgagee (of chattels) acquires the legal title. Not so of a pledge; and this is the distinction. In the case of the forfeiture, under a mortgage, equity only can relieve; while, in the case of a pledge, the pledgor's interest remains the same as before the expiration of the pay day (*Story on Bail.*, § 287; *note to Coggs agt. Bernard*, 1 *Smith's Leading Cases*, p. 360, *ed. of 1866*).

VI. Tender of the amount due discharges the lien (*note to Coggs agt. Bernard*, 1 *Smith's Leading Cases*, p. 352, *ed. of 1866*).

VII. An agreement, even, that upon default in payment at the stipulated day the property pawned should belong absolutely to the pawnee, is void, and the pawnor may still redeem (*Story on Bail.*, § 318; 2 *Story Eq. Jurisp.*, §§ 1008, 1009, 1019, 1031; *Garlick agt. James*, 12 *John.*, 143).

VIII. The facts in the case have been found by the jury adversely to the defendant's theory; and the court will not disturb the verdict, as it was found upon conflicting evidence.

The judgment should be affirmed, with costs.

By the Court, MULLIN, P. J.—On the trial of this cause the plaintiff gave evidence tending to prove that he delivered to the defendant a watch in pledge to secure the payment of eighty-two dollars borrowed by the former of the latter.

The defendant gave evidence tending to prove that the plaintiff sold him the watch for eighty-two dollars, under an agreement on his part to sell the watch back to the plaintiff on payment of the sum of eighty-seven dollars. The court instructed the jury that if the plaintiff sold the watch to the defendant, as testified to by the defendant, the plaintiff was not entitled to recover; but if the watch was delivered to the defendant as security for the loan of money the plaintiff was entitled to recover. The jury found for the plaintiff, thus finding the transaction between the parties to be a pledge and not a sale of the watch. Upon this finding the

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plaintiff was entitled to a judgment on the verdict. It appears that the plaintiff had been examined in proceedings supplementary to execution, and testified that the watch was delivered to the defendant under an agreement to sell it to him, and for a repurchase of it on the expiration of thirty days, on payment of five dollars in addition to the sum paid for the watch by defendant. The plaintiff also testified that the watch was delivered to the defendant by way of pledge, redeemable in thirty days on payment of five dollars in addition to the sum borrowed. He admitted having testified in the supplementary proceedings as stated above and reaffirmed the truth of the statement, but yet insisted that there was no sale to defendant, and excused the discrepancy by saying that at the time of his examination in the supplementary proceedings he was hard pressed, and that he intended to prevent the creditors from getting the watch, but he did not intend to swear to a lie. The jury would have been justified in finding the facts as sworn to in the supplementary proceedings, and if they had their verdict should have been for the defendant. But they accepted the other version of the transaction, as they had the right to do, and taking it to be true their verdict was right.

The appellant's counsel insisted that the plaintiff should have tendered the interest on the whole sum borrowed together with the eighty-seven dollars. I do not think so. None of the witnesses testify to an agreement to pay interest in addition to the five dollars bonus to be paid for the use of the money. In the absence of such an agreement the five dollars must be held to be in lieu of interest.

The judgment must be affirmed.

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N. Y. SUPERIOR COURT.

CANDID M. SCHMID agt. DANIEL V. ARGUIMBAN.

Where an *answer* is stricken out by the court as *sham*, without any leave given to serve a new or amended answer, the defendant is not entitled, on motion, to have the plaintiff's (regular) judgment set aside, and to be allowed to have an *amended answer* previously served stand.

Special Term, September, 1873.

THE defendant's answer was stricken out as sham, and no leave afforded by the order to the defendant to serve an amended or new answer. An amended answer was served, which plaintiff's attorney returned and entered judgment. The motion was to set aside the judgment and to allow *amended answer* to stand.

MR. ANDREWS, *for the motion.*

MR. SANDERS, *opposed.*

VAN VORST, *J.*—The answer of the defendant was, by order of the court, stricken out as sham, and judgment thereon was ordered for the plaintiff with costs.

The service of what purported to be an amended answer thereafter was irregular, as there was no answer to be amended.

If it is proper to allow an amended or other answer to be interposed in place of one held to be sham, such favor should be applied for and granted whilst the pleading is under consideration.

Without leave of the court thus obtained, and which should be expressed in the order adjudging the pleading sham, the same cannot be amended.

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In *Aymar* agt. *Chase* (*Code Rep.* [*N. S.*], 141) it was held that, after an answer has been struck out as sham, the defendant cannot serve a new answer without leave of the court, even though twenty days have not elapsed since the former answer was served.

In the case under consideration, notwithstanding the order adjudging the answer to be sham, the defendant could have subsequently applied to the court upon proper affidavits for leave to serve a new answer, and if good faith was shown, and reasonable excuse given, permission might have been obtained to have done so upon terms. But without such leave first had the defendant cannot answer anew after his answer has been adjudged sham.

Section 143 of the Code allows the defendant, as matter of, right to answer in twenty days after service of the complaint.

But after he has once answered, defendant has exhausted his privilege as a right under that section. Subsequent sections allow such answer to be amended as a matter of course within a limited time, but such amendment can only be made whilst the answer still stands as a pleading, not after it is stricken out (*Burrell* agt. *Bowen*, 21 *How.*, 378; *Burrell* agt. *Moore*, 5 *Duer*, 654). The proceedings of the plaintiff in returning the amended answer and in entering judgment were regular, and the defendant's motion to set aside the judgment and for an order to allow his amended answer to stand is denied, but without prejudice to the defendant's right to apply for leave to answer anew on a proper state of facts.

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COURT OF APPEALS.

JOHN GRAHAM, appellant, agt. ABIA SELOVER, respondent.

Where a complaint contains two causes of action, and the referee finds from the evidence that there were no such causes of action, this court will not interfere with such finding.

Where, after the close of the testimony, and the cause summed up, the further consideration of the case is postponed, to enable the plaintiff to move at special term to amend his complaint, which motion is made and denied, it will not be held as error by this court, although the referee might have allowed the amendment if the motion had been made before him, especially where the demand of the plaintiff is very stale, if not barred by the statute of limitations, and not, therefore, entitled to any favor from the court.

It seems, that where the plaintiff has fully ratified a settlement and discharge made by his agent of a claim against another, in favor of the plaintiff, the debtor is discharged therefrom and the plaintiff is bound, whether the agent had authority to make such settlement and discharge or not.

January, 1873.

APPEAL from a judgment of the general term of the supreme court of the first judicial district. The cause was tried by a referee, and his report, which shows the facts sufficiently, is as follows:

To the Supreme Court of the State of New York:

In pursuance of an order entered in the above action, dated the 22d day of June, 1867, by which it was ordered that said action be referred to me to hear, try and determine all the issues therein, I, William Mitchell, the referee therein named, do respectfully report:

I have been attended by both parties and by their respective counsel, and have heard and examined the witnesses and

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evidence produced by them respectively, and I do find the following matters of fact:

On the 23d November, 1850, the firm of Middleton & Hood were doing business in San Francisco, and were composed of John Middleton and John M. Hood. At the same time the firm of Selover & Co., composed of the defendant and said John Middleton, were owners and keepers of the Union Hotel at that place.

The plaintiff then and there sold to Middleton & Hood the bark Carlisle and its cargo, with all on board of her, for \$20,500, payable \$5,000 in cash, \$5,500 in the note of Middleton & Hood, at thirty days, and \$10,000 to be in the draft of Middleton & Hood on Selover & Co., at three months. The purchase was made for the benefit of Middleton & Hood alone, and not for the benefit of Selover & Co., and Selover accepted the draft for the accommodation of Middleton.

About December, 1851, the plaintiff placed the acceptance in the hands of F. Argenti & Co., bankers, in San Francisco, as his agents, and as security for advances made to him.

The plaintiff informed Middleton, before the acceptance matured, that Argenti & Co. had the acceptance for collection, with full power to settle with them, and this information (as I infer) was correct, and that Argenti & Co. afterwards acted under it.

In May, 1851, the Union Hotel was burnt down. The fire made Selover & Co. largely insolvent. In June of that year Selover left San Francisco, and arrived in this city in the following July, and here met the plaintiff, and informed him of the loss sustained by Selover & Co., and that Argenti was pressing them for payment, and wished the plaintiff to consent to the delivery by Argenti of the acceptance to Selover & Co. on their paying some sum to be agreed upon, in full settlement of all claim of plaintiff against Selover & Co. In August of that year it was agreed between the plaintiff and defendant that the plaintiff should authorize in writing Argenti & Co. to deliver the acceptance to Selover & Co. in

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full settlement of all plaintiff's claims against them, on their paying to Argenti & Co. \$8,500.

The authority to Argenti was never received by him (as I infer), but in August, 1852, Argenti & Co., acting as such agents and creditors of the plaintiff, and with such authority from him, agreed to accept and did accept the individual notes of said John Middleton for \$4,000, in all in full for such acceptance, said notes being payable at a then future day; said notes were subsequently paid to Argenti & Co., and the acceptance surrendered by Argenti & Co. to said Middleton. After the settlement was made by Argenti & Co., and the acceptance surrendered by them, and (as I infer) in the year 1852, Argenti & Co. rendered an account of the said settlement to the plaintiff, and of the balance coming due to him under the same, and paid such balance to him, and at the same time informed the plaintiff that they had delivered the acceptance to Selover or to Middleton. No objection (as far as appears) was ever made by the plaintiff to this settlement or to the account rendered. The said acceptance was the only liability that the defendant ever was under to the plaintiff, and that was jointly with Middleton, who is still living.

On the 27th October, 1851, Selover and Middleton dissolved their partnership, and Middleton assumed all the debts and liabilities of Selover & Co., and Selover transferred to him all the assets and property of said firm, and Middleton executed to Selover his bond to indemnify Selover against all the debts and liabilities of said firm.

I find as matter of fact, independently of the said joint liability, and of the facts herein stated subsequently to the statement of that joint liability, that the plaintiff assented to and ratified the settlement made by said Argenti & Co., and, as matter of law, that said defendant (as well as said Middleton) is discharged from all liability to the plaintiff, arising out of said acceptance.

I further find, as matter of fact, that no account was stated and settled between the plaintiff and the defendant, as stated

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in the complaint; that the plaintiff did not promise or agree to pay the plaintiff, or Argenti & Co., the sum mentioned in the complaint, or any other sum, except as hereinbefore stated, and did not promise to pay the remainder (after paying Argenti & Co.) to the plaintiff, by drafts to be sent to him from California, or in any other way; and that plaintiff did not deliver to the defendant an order on Argenti & Co. for the delivering to the defendant of said acceptance, or of any drafts, and that the defendant did not pay to Argenti & Co. \$3,250 on account of any indebtedness.

As to the second cause of action, I find, as matter of fact, that the plaintiff did not pay or advance for the defendant the sum of \$500 or any other sum, nor did the defendant promise to repay that or any other sum to the plaintiff, either as soon as he returned to California or otherwise.

I also find, as matter of fact, that more than six years have elapsed since any cause of action, set forth in the complaint, accrued in favor of the plaintiff, against the defendant.

I accordingly find that the defendant is entitled to judgment against the plaintiff, and to have the action dismissed on the merits, with costs to the defendant, to be adjusted.

J. A. SHOUDY, *for appellant.*

In reference to the statute of limitations—that it is not retroactive, cited *Stone* agt. *Fowler* (47 *N. Y.*, 566).

As to the point that it was incumbent on the defendant to prove his defense, and establish his presence in the state the full period of the statute of limitations, cited *Bennett* agt. *Cook* (43 *N. Y.*, 537).

As to the point whether the agreement of a creditor, without any new or fresh consideration, to take less than his debt, and to release the debtor is valid, cited *Keeler* agt. *Salisbury* 33 *N. Y.*, 648; *Hill* agt. *Beebe*, 13 *N. Y.*, 563).

As to the power of a referee to amend a complaint, cited (*Code*, § 272; *id.*, § 173).

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COLES MORRIS, *for respondent.*

As to a ratification by the plaintiff of the settlement between Middleton and Argenti & Co., whether the latter had any original authority to make it or not, cited *Leslie* agt. *Wiley* (47 *N. Y.*, 648); *Palmerston* agt. *Huxford* (4 *Denio*, 166;); *Dunlap's Paley*, 171, *note*; *Story on Agency*, §§ 252, 256).

As to the surrender of the acceptance by Argenti & Co., under the circumstances, was equivalent to a release of the unpaid amount due thereon, cited *Ellsworth* agt. *Fogg* (35 *Vermont R.* [6 *Shaw*, 577, 578]); *Sicey* agt. *Sicey* (3 *Barr*, 251); *Beach* agt. *Endress* (51 *Barb. S. C. R.*, 577, 578); *Albert* agt. *Zeigler* (29 *Penn. Rep.*, 50); *Shepherd's Touchstone* (p. 70); 2 *Equity Cases* (*Abr.*, 617), where lord HARDWICK says: "If an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged."

As to the statute of limitations—commenced to run on the acceptance on the 10th July, 1851—summons was served March 20th, 1866. Defendant's several absences from the state during the time aggregated six years six months and sixteen days, besides five months and fourteen days when he was abroad on business, leaving his family here, which, if deducted from the former time, would leave the defendant six years one month and two days a resident of this state. Claimed that the defendant was a resident of this state, and that during either of his absences in question he did not reside out of the state, cited *Code* (§ 100); 2 *R. S.* (297, § 27); *Hickok* agt. *Bliss* (34 *Barb.*, 321).

As to the application of *section 100 of the Code* to the remedy only, and not the contract, cited also *Morse* agt. *Goold* (11 *N. Y. R.*, 288); *Sedgwick on Stat. and Const. Law*, pp. 658, 659); *Sturges* agt. *Crownenshield* (4 *Wheat.*, 206); *Parsons on Contracts* (4 *ed.*, vol. 2, p. 379); *Dash* agt. *Van Kleeck* (7 *John*, 477).

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As to the effect of the payment made by Middleton in August, 1852, on the defendant, being after the dissolution of defendant and Middleton, it did not affect defendant, cited *Van Keuren* agt. *Parmelee* (2 *N. Y. R.*, 523); *Winchell* agt. *Hicks* (18 *N. Y. R.*, 558); *Shoemaker* agt. *Benedict* (1 *Kern.*, 176).

PECKHAM, J.—The complaint sets forth two causes of action. The first, after stating as matter of inducement that the defendant was indebted to him in a large sum of money upon drafts drawn upon and accepted by defendant, alleges that the parties accounted together, and an account was stated and settled, whereby the defendant was ascertained to be indebted to the plaintiff in the sum of \$14,327.77, which he promised to pay, as particularly specified in the complaint.

The second states a loan of \$500 to the defendant.

The referee to whom the case was referred, finds, in substance, that there was no such accounting and no such promise. As to the second claim, he finds that there was no such loan.

With these findings this court cannot interfere. There was evidence to sustain both.

It is quite clear that the complaint is not upon the drafts. It is carefully drawn, and is confined to the accounting and the promise to pay, based upon the indebtedness and "for other good and valuable considerations."

After the close of the testimony and after the cause had been summed up, the further consideration of the case was postponed to enable the plaintiff to apply at special term of the supreme court to amend his complaint. The motion was made and denied. The demand was very stale, some fourteen years old; and if the statute, under the circumstances, was not a bar, it was not entitled to any particular favor from the court.

Again, it appeared, and was found as a fact, that the defendant, with another, was merely an accommodation acceptor for

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the benefit of Middleton & Hood, and I think the settlement of the draft by Middleton with Argenti & Co., who held it as security for advances made to the plaintiff, and its delivery by them to Middleton, was a discharge of the defendant.

This settlement and delivery are found by the referee to have been fully ratified by the plaintiff, if not done by his prior authority.

But it is not necessary to consider this point.

The testimony claimed to have been erroneously received, as to the intended residence of the defendant, in this view is made wholly immaterial.

I have carefully examined the several other points made by plaintiff, as to the receipt and rejection of evidence, and am of opinion that no error to plaintiff's prejudice was committed.

The judgment should be affirmed.

PECKHAM, J., reads for affirmance.

All agree.

Schwinger agt. Hickox.

BUFFALO SUPERIOR COURT.

CHRISTOPH SCHWINGER agt. CHARLES HICKOX *et al.*

The *voluntary appearance*, by attorney, of several defendants in the action entitles the plaintiff to the same *costs* against them under section 307 of the Code, as if such defendants had been personally served with process. The voluntary appearance is equivalent to personal service of process, Code, § 137. (*The decision in the case of Macomber agt. Mayor, &c., of N. Y.*, 17 Abb., 35, *disapproved.*)

Special Term, November 15, 1873.

MOTION by defendants for readjustment of plaintiff's costs.

The action was brought against twelve defendants, and the summons was personally served on only two of them. The other ten defendants voluntarily appeared in the action by an attorney and answered the complaint. The issues thus joined were tried, and judgment was recovered by the plaintiff against all the defendants.

In the plaintiff's bill of costs he included an item of two dollars each for ten defendants and one dollar for a further additional defendant—total, twenty-one dollars. The defendants objected to this item, but it was taxed. The defendants now move for a readjustment of costs and ask to have this item disallowed.

GEO. WING, *for motion*, cited and commented on *Macomber agt. The Mayor, &c., of New York* (17 Abb. Pr. 35); Code (§ 307, *subd.* 1).

GEO. W. COTHRAN, *for plaintiff*.

II. The plaintiff is entitled to have taxed "for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant in excess of that number, served with process, one dollar" (Code, § 307, *subd.* 1).

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It is further provided that "a voluntary appearance of a defendant is *equivalent to personal service of the summons upon him*" (*Id.*, § 139).

The whole question resolves itself into a construction of the word "equivalent." When one thing is the equivalent of another, it is of the same force and effect as the other, of the same value, and *for all purposes*.

It cannot be successfully contended that to entitle a plaintiff to this fee that the summons should be personally served; because the Code provides for various modes of service. Personal service is provided for by section 134, service by publication by section 135 and by the 5th subdivision of section 135. When publication is ordered, personal service beyond the jurisdiction of the court is the equivalent of publication, &c. These various modes of service are provided for by laws of 1853, page 974.

It will not be argued that a service in either of these modes is not a sufficient compliance with section 307; and, with one exception, neither is a "personal service;" while the service in this case is the equivalent of personal service, the most complete and perfect service known to the law.

The Code does not say that the fee may be recovered for each defendant on whom process shall be *personally served*; on the contrary, its language is for each additional "defendant served with process." How served is immaterial.

The motion should be denied.

SMITH, J., denied the motion on the ground that the voluntary appearance of the defendants by their attorney was, for all purposes of the action, the equivalent of personal service, and entitled the plaintiff to the costs as adjusted. The case of *Macomber agt. The Mayor, &c., of New York* (17 *Abb. Pr. R.*, 35), in so far as it holds that a voluntary appearance will not justify a judgment on failure to answer without proof of the actual service of the summons, disapproved. No costs allowed, as the question is a new one.

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SUPREME COURT.

JACOB VOORHIS, Jr., agt. THE MAYOR, &c., OF THE CITY OF
NEW YORK.

Where a written contract is entered into by the contractor with the mayor, &c., for regulating and grading a street, which contains the specification of the work to be done and the price to be paid, not including *slopes* in excavation of *rock* outside of the perpendicular line of the street, but provides "that in case any other work is required to be done in order to carry out the provisions of this agreement, which is not called for in the specification, that he will go on and do the same without any claim for extra compensation therefor," the contractor cannot recover extra compensation for such slopes in excavation of rock :

1st. Because the contract does not call for this work; and, 2d. If the contractor finds it easier or necessary to do it, in fulfilling what the contract does call for, then it falls within the above provision for other work to be done without extra compensation.

It is competent for the parties to such a contract to make it an exception to the usual contracts of this kind, and whenever this is done, the terms of the contract must prevail. Custom or usage cannot be set up against it, there being nothing ambiguous in it, nor any intention respecting it which custom or usage should supply.

First Department, New York General Term, November, 1873.

Before INGRAHAM, P. J., FANCHER and BRADY, JJ.

PLAINTIFF seeks to recover \$13,928.93, the amount of a verdict rendered at the circuit, where exceptions were taken and ordered to be heard in the first instance at the general term. The amount of the verdict is claimed by the plaintiff for work under a contract with the defendants in regulating and grading section 1 of First avenue, from Thirty-seventh to Forty-second street, New York. It was proved at

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the trial that attempts for years to open First avenue were ineffectual, because the cost exceeded what the law allowed to be assessed upon the property for improvements, until it was found that by leaving out the slopes a contract could be made within the law. The opening was then ordered.

Proposals were published by authority of the common council, in which the number of cubic yards of rock excavation, the number of cubic yards of earth excavation, and the number of cubic yards of filling excavation were stated, according to the surveyor's estimate. Thereupon an agreement, dated the 15th August, 1859, between the defendants of the first part, and the plaintiff of the second part, contractor, was executed. By this contract the plaintiff agreed to provide all the necessary materials and labor for the regulating and grading "the entire width of the First avenue, from Thirty-seventh street to the center of Forty-second street;" and in the specifications and contract were contained the following: "Excavation—All rock to be taken off two feet below grade and replaced with earth without extra charge. * * * The slopes in excavation of earth will be required to have one of base to one of height. * * * For excavating rock per cubic yard, including its filling in, embankment, &c., forty-three cents. * * * In case any other work is required to be done to carry out the provisions of this agreement which is not called for in the specification, that he will go on and do the same without any claim for extra compensation therefor," &c.

There was also a provision in the contract that the return of the city surveyor having charge of the work should be the account by which the amount of materials furnished and work done should be computed. The surveyor did not allow for rock excavated outside the perpendicular lines of the avenue, and the plaintiff claims that the difference of rock cutting between that allowed for the whole rock excavation, including the cutting on the slope outside of the perpendicular line, was 24,525 cubic yards, and for which he was entitled to the

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verdict mentioned. He was allowed, against the defendants' objection and exception, to prove that it was usual and customary to allow for slopes. Plaintiff was duly paid for all the work except that claimed as aforesaid; and a motion in proper time was made to dismiss the complaint, which was denied, and the defendants excepted.

JOHN E. DEVELIN, *for plaintiff.*

RICHARD O'GORMAN, *for defendants.*

FANCHER, J.—An inspection of the written contract between the parties shows that no provision is made in it for excavating rock beyond the perpendicular lines of the avenue. It does provide that "the slopes in excavation of earth will be required to have one of base to one of height." That excavation of earth, outside of the perpendicular line, which would be necessary to make the slope equal to one of base for one of height, was, therefore, within the specification, and would be necessarily returned by the surveyor in his measurement. But no such provision exists in the contract as to rock excavation. Had a perpendicular wall of rock been left on each side of the avenue the contract would have been performed. It is said by the plaintiff that the excavation of rock slopes outside the perpendicular line was necessary, and he offered testimony to show that it was impossible to do the work without slopes "unless you cut with hammer and chisel." This evidence would only prove that while the contract did not call for slopes in rock excavation outside of the perpendicular line, still it was easier and cheaper for the contractor to make them by blasting or otherwise than it was to do the work in another manner. The answer to any claim of the plaintiff for compensation for such rock excavation outside the perpendicular line is that the contract does not call for it, and if the contractor finds it easier or necessary to do it, in fulfilling what the contract does call for, then it falls within the provision, "that in case any other work is required to be done

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in order to carry out the provisions of the agreement," the contractor "will do the same without any claim for extra compensation therefor." It is quite apparent that this contract intended to exclude any claim for such slopes in rock excavation, and the plaintiff had notice that such was the construction of the contract by the street commissioner early in the prosecution of the work, and afterwards as often as the surveyor made his returns relative to the work done.

There is another provision in the contract by which the plaintiff is bound. It is the covenant "that the return of the city surveyor having charge of the work shall be the account by which the amount of materials furnished and work done shall be computed, and that he shall not be entitled to demand or receive payment for any portion of the aforesaid work or materials, until completed and such completion duly certified by the surveyor." In the absence of evidence of fraud, collusion or unreasonable refusal, the certificate of the city surveyor in charge of the work is a condition precedent to any right of the plaintiff to recover. If given in good faith it concludes the rights of both parties (*Smith* agt. *Briggs*, 3 *Den.*, 73; *Wyckoff* agt. *Meyers*, 44 *N. Y.*, 144; *Adams* agt. *Mayor*, 4 *Duer*, 308; *Butler* agt. *Tucker*, 24 *Wend.*, 449). Of course, if a surveyor, architect or other person fraudulently or unreasonably refuses a certificate, the plaintiff may, on proof of such facts, recover on a *quantum meruit* (*Smith* agt. *Brady*, 17 *N. Y.*, 176; *United States* agt. *Robeson*, 9 *Peters*, 319, 375; *Thomas* agt. *Fleury*, 26 *N. Y.*, 33). But no such refusal was shown in this case. The rock slope outside of the perpendicular line was not a part of the work under the contract, which the contract required the contractor to perform. If he, nevertheless, made such rock excavation, it was done to facilitate his performance of the contract work. He has no claim, under the contract, to be paid for it.

Nor is the plaintiff benefited by the testimony as to an alleged custom among contractors to include slopes in rock excavation. The testimony of usage in similar cases was not

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admissible to interpret or control the contract in question. There is nothing ambiguous in it, nor any intention respecting it which usage should supply. Custom cannot be set up against the plain terms of a contract. The surveyor testified that "this contract was an exception to ordinary contracts." It was competent for the parties to make it so, and when they have made it, its terms must be resorted to when it is to be interpreted, and not custom. Whenever the terms of a contract indicate an intention different from the usage in similar cases, the terms of the contract must prevail (*Randall* agt. *Russell*, 5 *Dana*, 501; *Wheeler* agt. *Newbold*, 16 *N. Y.*, 392; *Dykers* agt. *Allen*, 7 *Hill*, 501; *Higgins* agt. *Moore*, 34 *N. Y.*, 422).

Besides, it would require strong evidence of settled and uniform usage to establish it; and, even then, it could not be allowed to control or take the place of a contract deliberately made; for that would be not only to thwart the contract, but to give to it an effect which the parties may not have intended.

We think the exceptions of the defendants in the particulars above indicated were well taken; that the verdict should be set aside and a new trial ordered, with costs to abide the event.

INGRAHAM, P. J., concurred.

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Where the *date* of a trip by witness to a certain place is material, on the trial of a civil action, it is not material whether the witness, swearing on that subject, knew that the hotel where he staid kept a register. Therefore, although he swore intentionally false on the trial that he did not know such hotel kept a register, yet he was not guilty of perjury (*see* 3 *Parker*, 510).

Where a witness states a transaction occurred on a given *date*, he has no right to confirm or corroborate his evidence by showing a paper made and signed by him at that date.

In this case it was *held*, that a witness called for the defense on cross-examination could not be asked whether he had not made a statement out of court inconsistent with what he had now sworn to in court (*see* 50 *New York*, 392; also *Schell* agt. *Plumb*, *ante*, p. 11).

September Term, 1873.

THE trial of this case commenced at the Saratoga oyer and terminer September 25th, 1873, justice JOSEPH POTTER presiding.

The indictment charged the defendant, Pearsall, with perjury in giving evidence on the trial of the civil action of John H. Bullard against said Pearsall at the Saratoga circuit in January, 1871.

On the 17th of July, 1868, Pearsall sold to Bullard, the plaintiff in that action, one-eighth of a patent for a stone-drilling machine invented by one Charles W. Hermance, and the patent by him assigned to said Pearsall, J. Howard Thompson, Ostrander, and Finne, one-fourth being owned by each.

The sale was made upon the representation that the invention and machine was of great value; that the machine had

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been exhibited and tested at the state quarries at Granville, Washington county, N. Y., by Pearsall and Thompson, and that Thompson would not take \$10,000 for his quarter interest in it.

Thompson was examined as a witness before the Saratoga county judge, March, 1870, and his testimony perpetuated at the instance of the plaintiff, and then testified that he and Pearsall went to Granville and exhibited said machine, but it did not operate satisfactorily, and that on his way home he told Pearsall that he would like to sell out his share for \$2,000, being \$1,000 less than he gave; and that he thought it was the last of June, 1868, when they so went to Granville, and that he was never there but on that one occasion.

The indictment charged that it was a material question to determine on the trial of said civil action whether the said machine was exhibited to Granville before July 17th, 1868, when the sale was made to Bullard, and whether Pearsall registered his name at the hotel; and that the defendant was sworn on said trial in his own behalf and testified falsely, as follows:

“That the said Pearsall and said Thompson went to Granville, Washington county, on the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and sixty-eight, and exhibited the stone-drilling machine; that he never went to Granville with said Thompson on but one occasion; that he did not exhibit said drilling machine at Granville with Thompson before the said sale to said Bullard; that Thompson did not tell said Pearsall before the said sale by said Pearsall to said Bullard; that said Thompson would sell his interest in said patent for \$2,000; that the said Pearsall had not been to Granville aforesaid with said Thompson to exhibit said machine before the said sale by said Pearsall to said Bullard; and that the said Pearsall, in answer to the question whether he registered at the hotel at Granville aforesaid, answered that he did not know as they had a register.”

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On the trial of the indictment the prosecution proved the proceedings in the civil action, and that the prisoner testified as charged in the indictment.

The prosecution also proved, by Bullard, that when he bought, Pearsall told him that he and Thompson had exhibited the said machine at Granville as alleged in the complaint in the civil action; and that Thompson would not take \$10,000 for his interest, or that Thompson considered the invention worth \$50,000.

William Johnson, of Hartford, Washington county, testified that he knew the parties; that he resided about six miles north of Argyle; that when he and his wife were returning home from Argyle, they met Pearsall and Thompson returning from Granville with said drill machine; that he stopped and looked at it and talked with them about the machine; that it was either July 16th, 1868, or about three weeks before that time when his wife went to order a bonnet from Argyle; that he had, and then produced his book in which he had entered that he got the bonnet July sixteenth, but had not entered the prior date when he went to order it; that he thought it was on the first trip that he so met them, but was positive it was on one of those trips.

William E. Jones testified that he was foreman of the Granville slate works, and saw the machine experimented with then by Pearsall and Thompson in the summer of 1868; thinks it was the latter part of June, but made no memorandum of the date.

Franklin L. Wheeler testified that he was clerk of the hotel kept at Granville in June, 1868, and had been since until 1872; produced the register kept at said hotel. The prosecution offered to prove by this witness that the prisoner's name, in company with Van Vandenburg, was upon this register under date of May, 1868, in the handwriting of the prisoner; that prisoner's name was not upon the register under the date of July, 1868; and that the leaf of the register containing the entries for June, 1868, had been cut out

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by some person to him unknown; that about January 1st, 1871, and about two weeks before the civil case was tried, the prisoner drove about thirty miles from his residence to said hotel and called for said register; that the witness looked it up and furnished it to the defendant; that he took dinner at the hotel that day, but did not register or disclose his name or business, and the witness did not then recollect him; that the witness did not watch the defendant, and could not, therefore, tell whether or not he abstracted the leaf for June; that after the defendant left the witness put the old register away; that after the trial of the civil action Bullard went over to see said register, and the witness then got it and found that the June leaf had been abstracted.

The counsel for the defense objected to the above evidence. The court decided that it was not material whether the defendant had registered his name in June, or whether the witness knew such register had been kept, when he testified two weeks after that "he did not know as they had a register."

The prosecution cited *People* agt. *McKimey* (3 *Parker, C. R.*, 510); and claimed that such evidence was circumstantially material on the trial of the civil action; and secondly, it was competent to show that the prisoner had made no mistake when he testified to July as the date of the trip to Granville; that he gave such testimony deliberately, and after a trip of thirty miles to examine that date. The court sustained the objections and excluded the evidence offered, and stated that the prosecution could except, if they did not think the decision was correct. The counsel for the prosecution stated that such exception would be of no avail in a criminal trial.

Homer H. Inglesbee testified that he resided on the farm next north of William Johnson; that he remembers the occasion when Pearsall with another man passed south with the drill in a wagon in the summer of 1868; that he was then engaged in getting in hay from a small clover field;

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that he finished that field on Saturday, and on that day one Draper called for him to go to Sandy Hill with him, and he promised to do so as soon as he got the haying done in that field; that he did meet Draper at the law office of U. G. Paris on the Monday following, June twenty-ninth, and then made a contract with him which the witness offered to produce, which was objected to by the defendant's counsel. The counsel for the prosecution offered to produce said paper and show that it was dated June 29th, 1868, signed by the witness, and that it was dated the day he was at Sandy Hill with Draper. This was objected to and excluded by the court.

Several other witnesses were called by the prosecution, who testified to facts tending to show that said trip to Granville was made by the prisoner and Thompson in June, 1868.

On this trial the defendant testified that he received the drill from the boat at Schuylerville, June 24th, 1868, and started for home; before he got there he turned about and took it back and left it in Hermance's barn until July eleventh, when he went and took it home.

Charles W. Hermance was sworn for the defendant, and testified that on the 24th day of June, 1868, he found a drill machine had been left in his barn at Schuylerville, and that it remained there until July 6th, 1868, when he went to Troy, and on the 11th of July, 1868, returned from Troy and found said drill had been taken away. On cross-examination he stated that he was examined on this subject in Troy, February 21st, 1871. The prosecution offered to prove that the witness did not produce any memorandum on that occasion, but stated that he had one at home which he would exhibit to such person as counsel should appoint. Objected to and excluded. The witness testified that on the 27th day of February, 1871, Daniel A. Bullard did call upon the witness for that purpose at Schuylerville.

The following question was then put to the witness: "Did you then and there (February 27th, 1871) state to

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him (D. A. Bullard) that upon reflection, since you had been examined in Troy, you were satisfied that the drill that came to your barn in Schuylerville was painted and altered by you, and that Ostrander and Finne took it to Ballston to see what they could get it made for, and that such drill did not go to Pearsall's, and it never went there; and you did not remember about the drill that went to Pearsall's, but you knew it never came to your house; that you never saw that drill and did not know anything about it? Objected to by defendant's counsel and excluded by the court.

E. F. BULLARD, *for prosecution.*

E. L. FUESMAN & J. P. BUTLER, *for defense.*

The evidence being closed, the court gave the following charge to the jury :

GENTLEMEN OF THE JURY : The case before you is an indictment against Mr. Pearsall. It is alleged in the indictment that at a court held at this place, in 1871, an action was tried in which Pearsall was defendant, and John Bullard plaintiff; that Pearsall was sworn, in due form of law, as a witness upon that trial, and that he then testified, falsely and corruptly, to material matter under consideration in that case. The charge is a very serious one, and demands your cautious, candid consideration. So far as appears from anything connected with this case, the complainant is a respectable man, and he brought that action to recover what he claimed was rightfully due him by reason of a sale of an interest in a patent right. The defendant, aside from what is here alleged, appears to be a respectable man, occupying a respectable position in society, and a man of good standing.

The crime of perjury is a base crime, involving not only serious consequences in the way of punishment to the person committing it, but it evinces a degree of depravity and turpitude far exceeding that of many other crimes.

To make out a case of perjury, it is necessary that the people allege and prove that there was a legal proceeding in

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which it was proper, competent and necessary to administer an oath, and that an oath was administered, and that the person to whom it was administered testified willfully and corruptly to that which was false, and that it was matter material to the issue to be determined upon such trial.

In regard to some of the facts necessary to make out this case on the part of the people, there is not much controversy.

From the documentary evidence offered, it appears that the action was brought against Pearsall by Bullard, the issue came to trial, and that the plaintiff failed to establish the allegations and did not recover. Some of the things transpiring upon the trial have been proven before you. That an oath was administered is proved, and I have held, as matter of law, that it was properly administered by the clerk; that he had competent authority to do it, and that it was done in due form. The other matters are more or less in controversy. You are to decide not only in relation to the testimony the defendant gave upon that trial, but also whether it was given corruptly, willfully, intentionally, understandingly. To illustrate: A person may swear to a thing entirely untrue, and yet not be guilty of perjury in the least degree, for he may testify to it under a mistake. It must be done willfully; the person testifying must have knowledge that what he is testifying to is untrue. Oftentimes it happens on the trial of causes, perhaps in this very trial, unintentionally of course, that things are sworn to that are untrue, and yet the person so testifying, if it is not done willfully and knowingly, is not guilty of perjury. From the conflict of testimony, from the disagreement of witnesses as to time and circumstances, it is evident that mistakes are made. Therefore, you will see that it is necessary that the party must testify corruptly to what is false. It is claimed that there is evidence here that will support that element in this case, in the fact that the defendant was testifying in a cause wherein the plaintiff sought to recover money he had paid to him for a worthless article.

You must also pass upon the materiality of the evidence

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given. A man cannot be convicted of perjury unless the matter he testified to was material to the issue. If a witness should state under oath fifty things that have no relation to the matter in dispute between the parties, and although every one of those fifty things were untrue to his knowledge and he state them willfully, yet, the matter not being material, it is not perjury. The matter testified to in this case was of this character. Bullard had purchased of the defendant an interest in a patent right and paid him \$1,500 therefor; and afterwards, becoming dissatisfied with the bargain, or thinking he had been imposed upon or defrauded, or that the article was not of any value, brought an action against Pearsall to recover what he had paid him. In his complaint he alleged that Pearsall, on the occasion of, and before, and during the negotiations which resulted in the sale of this interest in the patent right, represented to him that the article was a good thing; and he also alleged that it was represented that the machine had been tried at Granville, and it did not prove a success there, as they were not satisfied with its operation, and no sales were made, and it was claimed that those things constituted a cause of action against Pearsall, if the representations were made by him as an inducement to the purchase, and were in fact untrue to his knowledge. It was necessary that Bullard should prove those allegations in order to have a recovery in that action. A portion of the evidence and charge have been read here, from which it appears that one of the things relied upon in that action was whether the defendant said the drill was a good thing. If that was intended as a representation that the drill was a useful thing, that it had intrinsic value and would answer a useful purpose, and that was believed by Bullard, the person making the purchase, to have been so intended, the representation in that sense, and it was not so, Pearsall knowing that it was not so, then that representation would be a material matter. You will observe that in saying this, he does not state any particular quality that this machine had, how much work it would perform; he

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simply represents it to be a good thing. In that case, perhaps, it was properly left to the jury to say whether a man saying it was a good thing meant that it was a valuable thing; that it had intrinsic merits and would perform work economically. It is for the jury to determine what such a remark meant. If it was such a remark as merchants or others having property to sell are apt to make, that it is a good thing and worth so much, that there is a scarcity of the article; if it was simply the expression of an opinion or merely a representation without intending to assert any particular fact in relation to it, that would be one thing; but if it was intended to be a representation that it was valuable, then that is quite another thing. I called upon counsel to produce a case where an article had been represented in that manner, and I think it will hardly fall within the experience of any one that a man who says such a horse is a good horse, means thereby to assert any particular quality of the horse. The bearing that this has is, that if by saying that it was a good thing the defendant meant that it was a valuable thing, it was necessary for Bullard to prove, before he could recover, that Pearsall made the representation, that it was false, and that Pearsall knew it was false. This evidence was brought out upon that trial evidently for the purpose of showing that Pearsall knew the falsity of that which he had stated. Upon that trial, I apprehend, they did not seek to show that he had admitted anywhere that this machine was not a good thing, or that any other representation was not true, but they sought to show that he did know these things, because why? Because he had seen that machine tested in Granville, and knew just what it had done and what it failed to do, and that had taken place before this sale. If the machine had been to Granville before the sale and had proved a failure, having radical, inherent defects, and Pearsall was there and aware of the failure, that would be very important evidence for the jury in that case upon the question of his knowledge. It was claimed that the defendant knew these things because he

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was there and saw them. The answer to that was that he was not there; he would not have them infer that he knew anything about it because that had not taken place; that when this sale took place, the seventeenth July, that machine had not been used at Granville. The defendant is here indicted, and it is alleged against him that that drill had been tested in Granville prior to the seventeenth July, when the sale was made, and that is the only question you are to consider, whether his testimony in that respect was true or false, that being the only assignment or allegation of perjury. That brings you to this question, did Pearsall, when he testified that that drill had not been used in Granville prior to that sale, testify to that which he knew to be false? As I said before, that is the assignment of perjury; beyond that you need not go.

To apply the principle I stated a moment ago, it is possible that Pearsall may have testified to that, that it was untrue and yet not be guilty of perjury, because as I said before he must testify to it willfully and corruptly, and it must be false and relate to a material matter; for if it has not those three elements, no matter how untrue it is, it is not perjury. This will bring you to the consideration of a question of fact. You will determine first from the evidence whether that machine was used there prior to the seventeenth July.

Mr. Jones, who is engaged in the quarry where they have occasion to drill, and where this machine was taken at some time and tested, states, when asked as to the time, that he thinks it was in June; he made no memorandum of it; he could not tell what time in June, and on cross-examination he could not tell that it was not perhaps in the fore part of July. He is asked with the view of ascertaining the correctness of his recollection as to the time he talked with Burdick, and he says he can't tell what year or month Burdick came, having made no memorandum. It appears that five or six other persons were there besides his brother, and none of them are called as witnesses. Jones was asked

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whether he remembered his brother keeping the time and stating that the machine drilled three or four inches a minute, and he said he did not; while other witnesses testify that such was the fact. Now it is for you to say whether in the case of men testifying like Pearsall—and I am now considering his testimony on the former trial—suppose Jones and he had testified on the former trial, Pearsall testifying that he knew what day he went there; that he made a memorandum that night and was positive; how would a jury have found? Would they have said that Pearsall had testified falsely as compared with the testimony of Jones? Mr. Johnson, who lives in Hartford, and who formerly lived in this county, testifies that he lived five or six miles from Argyle; that he and his wife went to Argyle for a bonnet in the month of June, and about a fortnight from that time they went down and got the bonnet; and that on one of these occasions, which he thinks was the first time, he met these men coming in the direction from Granville, having the drill in the wagon, and he there had some conversation with them. Johnson says he kept a diary, but he did not enter the day they went to get the bonnet, but did enter the day they came from Argyle with the bonnet and paid for it. He further testified that he made this memorandum in the evening of the day that he met them, when Inglesbee was there; and, I think, afterwards corrected it, saying it was not made that evening. Mr. Johnson, so far as appears, is a respectable man; he says he is about seventy years of age and has a poor recollection. He says he was not in the habit of going to Argyle very often; but when asked as to whether he did not go down twice that July, he would not swear he did not; and would not swear he did not go down five or six times that summer. He will not testify positively, but is quite confident in his recollection, and it is for you to say what weight you will give to his testimony. Because a witness asserts and assumes that his recollection is infallible it does not follow that the jury are to take his esti-

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mate of it. That would be a very unsafe rule to be governed by as to any matter, and especially as to his testimony on the stand. The jury will consider the manner in which the testimony is given and the surrounding circumstances in determining the degree of credit to be given to a witness, statement. Mr. Inglesbee, who lives in Washington county, testifies that he was at work with his boy in a clover field; saw these men pass; had seen Pearsall once or twice before; saw them stop in front of Johnson's and then drive along, and I think he saw the drill. He testifies that he went to Johnson's that evening and had a conversation with Johnson about these men and the drill, and he thinks (and he is a man evidently who thinks pretty well of his own opinion) that it was in June, the day Johnson went to Argyle the first time. When inquired of as to the correctness of his recollection he says, not that he made any memorandum, not that he was aware that Johnson made any memorandum, but that he made no entry at all in relation to this transaction; and that he remembered it because on Monday he went to Sandy Hill and there signed a contract with Draper. If you see the connection between those transactions, and that it is a circumstance that enables him to recollect, you will give it all the weight it should have, why he selects that circumstance that he went the following Monday, why he does not say he remembers it because of something he did the following Tuesday, or what connection the two transactions have is for you to consider. Homer Inglesbee testifies that he was in the field; saw two persons go along; went to Johnson's that night and heard some conversation in relation to these men and the drill. He recollects the circumstance, not because he made any memorandum, for he swears he did not, but he remembers it because the next day he signed the contract as a witness. It was not a paper in relation to this transaction; yet he says he remembers that these men passed on that day, because the next day he signed a paper as a witness for the first time in his life. Whether that would enable him to

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remember what took place that day I do not know. I can see why he remembers the fact of signing as a witness the first time, but I do not quite see—perhaps you may—why it would aid him in remembering anything else that occurred just before or just after, that had no connection with it. You will give that all the weight it is entitled to. Some question was made as to his testimony. You remember that he said he had not conversed with anybody about this matter from 1868 until last Monday, when his father was subpoenaed as a witness, at which time he had conversation with his father about it, and after coming here he talked with counsel. The father says in his affidavit the reason he remembered it was that he remembered it and his son remembered it.

The plaintiff in that action swears that the defendant admitted to him that he had been to Granville. That, of course, is the very thing in dispute. He has testified to it once before, and if he speaks from present recollection he is entitled to the same credit as any witness. But you will see that he is asserting what he then testified to, and Pearsall testified then and does now the opposite of that.

That is the substance of the testimony on the part of the people. There is a great deal of corroborating evidence which it is your duty to recall and give weight to. There are many things I have not mentioned which I do not omit because I deem them of no importance, but which you will remember.

I have spoken of the testimony of those witnesses who testify in relation to the time this machine was tried, whether before or after the sale. You might, and perhaps it may aid you in the determination of this question, stop at that point and take a review of the situation. As I said before, it was necessary for the people to prove these things, and you may well stop there and inquire whether the people have established to your satisfaction, and beyond a reasonable doubt, that when Pearsall testified that this machine had not been

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tested at Granville until after the sale he testified to that which was true or untrue, and if untrue whether he knew it was untrue, and testified corruptly, and the matter was material. If on a review of the case you come to the conclusion that it has not been established that he testified falsely, then, of course, you need not go any further in the evidence, for the people must sustain the charge by proof, every man being presumed innocent until proved guilty, and the jury, before a conviction can be had, must be satisfied beyond a reasonable doubt that the charge is proved. If the innocence of the prisoner is consistent with any fact which you have determined to a certainty in your own minds, he is not to be convicted. I like that rule much better, and I will repeat it. If the innocence of the prisoner is consistent with the facts which you find from the evidence, then he is to be declared innocent.

Now, applying that rule in this case, what fact are you satisfied of and compelled to find, as reasonable men, which is inconsistent with the innocence of this prisoner, and that he did not try that machine in Granville prior to the sale? Outside of that rule you would have to find that some of these men who testified in relation to time, testified with that degree of assurance that brings your minds to the conclusion that that machine was tried before the sale. If Thompson or Inglesbee, or young Mr. Inglesbee or Jones are mistaken, if they may be mistaken, if your minds are not necessarily brought to the conclusion that what they have stated as to the time is the true time, it is perfectly consistent with his innocence. But if your minds are brought to that point and you can't get rid of it, of course, his innocence is inconsistent with the facts you are bound to find. If you come to the conclusion that the people have made out their case, and proved all the essentials that constitute the crime of perjury, of course, you come to consider the defense.

In relation to that, the defendant has put in two species of evidence. The drill which Wood brought on the packet

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boat to Schuylerville is the drill which went to Granville. It is not pretended that the only other drill we have heard of, and which went to New Jersey, was ever sent to Granville. Wood testified that he brought this drill to Schuylerville on his packet on the twenty-fourth June, and that he helped Pearsall load it into his wagon, and Pearsall, being refreshed in his recollection, thinks he did. Pearsall testified—I will have to take it a little out of order—that he put it on his wagon, took it part way home, turned around and brought it back and put it in Hermance's barn. The day it arrived there, there is no dispute about. Hermance is called and swears that that drill was brought to his premises and put either in or near his barn on the twenty-fourth June; that it remained there from that time until the seventh July, when he went to New York, and when he returned on the eleventh it was gone. The witnesses for the people say that this drill was in Granville about the twenty-fourth or twenty-fifth June. If Hermance's testimony is true, that he saw this drill there, and that other members of his family saw it—if Hermance is correct, that drill was not in Granville at the time. There were other witnesses who saw it and who might have been called. It is suggested that if that drill had been there the defendant would have called other witnesses. Perhaps he would and perhaps he would not. It is proved by Hermance that the drill was there, and perhaps defendant's counsel did not think it necessary to call other witnesses to prove that it was there when nobody had contradicted Hermance. If Hermance is not very much mistaken, or has not testified falsely, then the drill could not have been in Granville at the time it is claimed to have been. Pearsall, himself, is a witness, and I speak in regard to his testimony as to where the drill was. He swears he took the drill to Hermance's barn and that it remained there until the eleventh. If Pearsall's testimony is true, that the drill remained there from June twenty-fourth until July eleventh, then it could not have been in Granville.

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There is another kind of evidence, that is the testimony of the two Vandenburgs, who swear, and they give the reason why they know, because Vandenburg had a lame hand, injured in June, and he caught cold the fourth of July and remained in the house two or three weeks. They swear that Bullard came to the house, and two or three days after he was there again, and said he had bought an interest in a patent, and Pearsall and Thompson were going to take it to Granville.

If that is true, it secures two purposes; first, to show that the drill was there up to that time, and also to contradict Bullard, for Bullard says he did not say so. They testify to some other facts; they say that Thompson and Pearsall went past their house subsequent to that conversation, which was in July, going in the direction of Granville; that they were together in a wagon and had this drill in the wagon, and that that was the only time they ever saw them going that way, and the only time they ever saw them in a wagon together. Thompson and Pearsall testify that they were not in a wagon together again that summer. If the Vandenburgs are correct in what they say in relation to Bullard's conversation and what they saw there, then, of course, the drill was not tried in Granville in June, as claimed.

Then there is the testimony of Thompson, who swears that he was interested in this drill, and knows that he went with Pearsall to Granville and was present when the drill was tried in Granville, and that it was on the 24th July; that he never was at Granville at any other time for the purpose of trying that drill, and never was with Pearsall in a wagon with the drill but on that occasion. He swears that he soon afterwards made a memorandum showing that was the time. He swears that they crossed the river at Fort Edward and stopped at Fort Ann for dinner and registered there. He swears he saw Pearsall write their names, and after dinner they went to Granville and there tried the experiment on the day succeeding, which would be July 25, instead of June.

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Pearsall testified to the same thing, with a little more minutia. He also testified that on his return from Granville he made a memorandum, which is produced, it thus appearing that such a memorandum was made.

Pearsall is the party indicted; the law allows him to be a witness. You will take into consideration his manner of testifying, the surroundings of the man and the circumstances of the case, as well as his interest in the matter.

It is fair to say that Bullard was a witness on the other trial; is the complainant here, and no doubt has some feeling; it is for you to say how much his feeling towards Pearsall and the result of that trial and the loss it is claimed he sustained, \$3,000, affect his testimony. These are legitimate matters for the jury to consider, how much the feelings of these witnesses affect their testimony.

There is another kind of evidence. The register which was kept at the hotel at Fort Ann is produced, and upon which appears written, in the handwriting of Pearsall, his name and that of Thompson. Pearsall testified that he did register both their names. Thompson swore to the same thing, that Pearsall registered both their names. Mr. Wing, who was the proprietor of the hotel, swears that this was the register kept there; that he is not aware of any change in its condition from that time until this; that he broke up keeping the hotel and went several places, but the register was kept in his family. He swears that Jackway came and asked him for the register, and he gave it to him; Jackway, a respectable lawyer, against whom nothing can be said, says he procured this register at the request of Pearsall and kept it until Pearsall came; that then he and Pearsall sat down and examined the register, and the names, as shown here to-day, were upon it when he opened it with Pearsall. It is said that Pearsall could have gone and made these entries; it is for you to say whether he could have gone and got that book and made these entries, and Mr. Wing or his wife or anybody else who had the custody of the book never have heard of it. It is for

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you to say whether he would have made them when he procured Jackway to ascertain where it was and obtain it. The register has been submitted to you, and you may take it again and see from the position of these names and the ink with which they are written whether it does not support the testimony of Pearsall. It is said that these names are written near the foot of the page; you will look on other pages and see if names are not written as near or nearer the bottom. It is said that there are different kinds of ink. Wing testified that he had different kinds of ink, and if you look on other pages will see different kinds of ink, and perhaps the same kind of ink.

I have gone through the testimony so far as I deem it important. It is your duty to recollect all this evidence. This is an important matter, and you should examine it carefully and candidly, and if you are satisfied beyond a reasonable doubt that this defendant is guilty, it is your duty to find him guilty.

The jury rendered a verdict in favor of defendant.*

*If the verdict of the jury in this case is correct, it leaves John H. Bullard (a respectable man), the plaintiff in the civil action and the complainant in this case, in the unenviable position of having committed willful and corrupt perjury on three several occasions—once on the trial in the civil action, again before the grand jury who found this indictment, and again on the trial of this case. For there is no alternative or chance for mistake; either Bullard committed perjury three times, as stated, or the defendant Pearsall committed perjury twice, once on the trial of the civil action and again on the trial of this case. Every one who reads this remarkable trial will judge for himself which it is.

If there could be a Code devised which would make parties litigant honest enough to swear to the *truth*, whether diametrically opposed to their interests and feelings or not, the rule of the statute allowing parties to be witnesses in their own behalf, in actions for or against themselves, would appear to be of some practical value. But as it is, this statute seems to be a standing temptation to the commission of the crime of perjury, which human nature in its weakness, in most cases, perhaps, is unable to resist.—REP.

Newberry agt. Furnival.

SUPREME COURT.

WILLIAM B. NEWBERRY and another, appellants, agt. SAMUEL FURNIVAL and another, respondents.

It is undoubtedly the rule that when a witness on *cross-examination* testifies to a *collateral matter*, the party making the cross-examination is not allowed to contradict that testimony, because a contrary rule would lead to the trial of numerous collateral issues.

But this rule never applies to testimony which is not collateral and which is material to the issue. When a party on cross-examination brings out evidence material to the issue, he is not necessarily bound by it, but may contradict it by other testimony.

In an action for alleged breach of contract in defendants refusing to receive and pay for certain goods which the plaintiffs contracted to sell to them, subsequently to arrive in a designated vessel, in order to recover it is necessary for the plaintiffs to show the delivery or a readiness and offer to deliver the *whole quantity* of goods.

Where a *part* of the goods arrive, if the defendants, knowing this fact, accept it, this probably will be a waiver, or if they make no objections to a delivery of the whole at that time, but affirmatively refuse to receive them on some other ground, this probably would constitute a waiver of delivery of the whole.

First Department, New York General Term, November, 1873.

Before INGRAHAM, P. J., BRADY and LEARNED, JJ.

THIS is an action to recover for alleged breach of contract, in that the defendants refused to receive and pay for certain jute hemp which the plaintiffs contracted to sell to them.

The written contract is annexed to the complaint, and is as follows:

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“DANIEL L. STURGIS, Hemp Broker, }
“117 Wall Street, }
“NEW YORK, *May* 19, 1870. }

“Sold for account of Messrs. Newberry & Son, to Messrs. Furnival & Ritchy, four hundred and thirty-one (431) bales jute hemp, to arrive from London per ship Robena, in good order and free from damage, at five and three-fourths cents per pound, gold, cash, payable fifteen days from delivery alongside vessel, purchaser to advance gold sufficient to pay duties.

“DANIEL L. STURGIS, *Broker*.

“Accepted—FURNIVAL & RITCHY.”

LEARNED, *J.*—It is found by the referee—and the finding is sustained by the evidence—that in this transaction Sturgis acted for the seller and not for the defendants.

When the ship Robena arrived she brought only 343 bales for the plaintiffs. The remaining eighty-eight bales subsequently arrived by another ship about a month later. On the arrival of the Robena the plaintiffs delivered Sturgis an order for the delivery of 344 bales of jute to Furnival & Ritchy. By means of this order Sturgis procured the delivery of the jute to him and stored it in his name in a public store. On the arrival of the Robena, Furnival examined the jute on the dock, and went to Sturgis and told him it was not the hemp he agreed to purchase, and refused to take it on that ground, assigning no other reason. He had no knowledge or notice then that the whole 431 bales, called for by the contract, had not arrived.

The referee further finds that neither the whole nor any part of the jute was ever offered or tendered to defendants by the plaintiffs.

He finds that the jute was merchantable. It can hardly be disputed that, in the sale of the jute, Sturgis was agent for the plaintiffs. He testifies that he was employed by them to sell the jute, and the contract itself shows that he

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was not the agent of the defendants because they signed it themselves. So also, on the arrival of the Robena, Sturgis asked the defendants for money to pay the duties. Sturgis did not act as the agent of the defendants in any of the dealings between the parties. Such was the opinion of the referee, and it seems to be sustained by the evidence.

It is insisted, however, on this point as to the agency of Sturgis, that the referee erred in the exclusion of certain evidence. On the cross-examination by the defendants of Sturgis, who was the plaintiffs' witness, he testified that he told one of the defendants that the plaintiffs could not deliver the full number of bales at that time. Subsequently that one of the defendants was called and contradicted this statement. The plaintiffs insist that this was error, and cite *Crounce* agt. *Fitch* (6 Abb. N. S., 185, &c.), and other cases. It is undoubtedly true that when a witness on cross-examination testifies to a collateral matter the party cross-examining is not allowed to contradict that testimony. The reason of this is not that by this cross-examination the party cross-examining has made the witness his own. It is because a contrary rule would lead to the trial of numerous collateral issues; such too as the opposite party is not supposed to have expected to try. But this rule never applies to testimony which is not collateral, and which is material to the issue. When a party on cross-examination brings out evidence material to the issue, he is not necessarily bound by it, but may contradict it by other witnesses. In the present case the knowledge by the defendants, at the time when the first parcel of jute arrived, that the whole had not come, was very material. On the denial of a motion for a nonsuit the referee rested his denial in part on a waiver by the defendants as to the delivery of the whole of the jute. Of course there could be no waiver unless they knew that only part had arrived. Their knowledge, therefore, of this fact was material to the issue, and they had the right to contradict the testimony of Sturgis on this point.

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Assuming, then, that Sturgis was not the agent of the defendants, none of his acts constituted a delivery to the defendants or an acceptance by them.

The case is then presented of an executory contract to deliver certain goods, to arrive by a designated vessel. In order to recover it was necessary for the plaintiffs to show the delivery, or a readiness and offer to deliver, the whole quantity (*Baker agt. Higgins*, 21 *N. Y.*, 397).

When a part of the jute arrived, if the defendants, knowing this fact, had accepted it, this would have been a waiver. Possibly, too, if, knowing this fact, they had made no objections, and had affirmatively refused on some other ground to receive the jute, this might have been a waiver. But it is found that they did not know that only a part had arrived, so that they waived nothing. The plaintiffs were not then in a condition to perform, and could not have performed their contract. Unless, therefore, their inability to perform was knowingly waived by the defendants, the plaintiffs cannot insist that the defendants shall carry out a contract which they themselves cannot. Undoubtedly there is a conflict of evidence as to the point whether the defendants knew that only part had arrived. And there is a further conflict as to the point whether the defendants had notice of the arrival of the remaining bales. But upon these points the finding of the referee is with the defendants. And the judgment of one who saw and heard the witnesses ought generally to be conclusive in such cases. So much must depend upon the appearance and manner of the witnesses that we ought to be reluctant to review findings of fact where there is a decided conflict between witnesses in their testimony.

The judgment should be affirmed, with costs.

INGRAHAM, P. J., and BRADY, J., concurred.

Kamp agt. Kamp.

SUPREME COURT.

ANN C. KAMP agt. HEINRICH KAMP, known as HERMAN KRALL, and others.

The superior court of the city of New York has jurisdiction to grant a divorce and allow alimony where the parties are properly before the court.

If, after a judgment of divorce has been rendered by that court without making any provision as to alimony, and subsequently an order of that court is made on the foot of the judgment or decree, allowing alimony and making particular provisions for its security and payment out of certain real estate of the defendant, this order cannot be attacked collaterally and want of jurisdiction of that court interposed as a defense in an equitable action against the defendant in the supreme court to set aside as fraudulent certain conveyances made by the defendant to avoid carrying out and performing such order for alimony.

The jurisdiction of courts of equity to grant relief in cases of fraud and trust was not abolished by the statute which instituted a creditor's bill upon a judgment and an execution returned unsatisfied.

But it is well settled that an action to set aside a fraudulent conveyance may be maintained by a creditor without judgment, who is otherwise remediless.

Held, upon the clear weight of evidence on behalf of the plaintiff in this action, that the conveyances from the defendant to Schneider and from him to Miss Burgraff of the premises number 6 Elizabeth street, be declared to have been made with the fraudulent intent of defeating the recovery of alimony by the plaintiff from the defendant and the security which he was required to give, and that the said conveyances are void as against the plaintiff. A receiver appointed, &c.

New York, November, 1873.

HATCH & VAN ALLEN, *for plaintiff*.

WM. H. LEONARD (late justice supreme court), referee. It would be quite improper for me to sit in review upon the

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authority of a judge of the superior court, to pronounce the decisions granting alimony in this case. The attempt of one judge at special term to review the order or decision of another judge, made at a special term, has been condemned by the court of appeals *In re Livingston* (34 *N. Y.*, 555,) and by the commission of appeals in *Fisher* agt. *Hepburn* (48 *N. Y.*, 41, 53).

I incline to the opinion, however, that the question of jurisdiction has been waived, if it was ever available. It should have been urged, in a case of this kind, before the court when the order granting alimony was applied for, and, if overruled, it should have been further urged by an appeal.

The New York superior court has jurisdiction of the parties and of the subject-matter. The only fact from which the objection is claimed to arise, is, that the judgment of divorce had been rendered without making any provision as to alimony, and that there was no authority to grant it afterwards. If this was an error or irregularity, the defendant *in the action* might have it corrected by appeal.

The objection to the jurisdiction comes up, in this case, on account of the form of the proceeding, it being after judgment rendered.

It cannot be claimed that the court had not jurisdiction to hear and decide the right of Mrs. Kamp to a divorce against Mr. Kamp, nor to direct alimony in a proper case. The granting of it after judgment is a question of practice, to be corrected, if irregularly or erroneously granted, by an appeal. It is very probable that the judge may have been influenced by the statute as to his power to order alimony after judgment rendered (3 *R. S.*, 236, § 58). It is so indicated by his opinion (44 *How. P. R.*, 505, *Kamp* agt. *Kamp*).

If a court has jurisdiction it has a right to decide every question which occurs in the cause, and its judgment is binding till reversed (*Wilcox* agt. *Jackson*, 13 *Pet.*, 511). Whether the proof shows a right to the relief sought, is judi-

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cial; whether the court has the authority to determine the right, when proven, is jurisdictional (*People agt. Sturtevant* 9 *N. Y.*, 263).

The granting of alimony in divorce is within the jurisdiction of the superior court when the parties are properly in court. If granted improperly, the aggrieved party must seek redress by appeal.

The order of the New York superior court cannot be attacked collaterally, and I consider this objection also fatal to the defense of want of jurisdiction (*Le Guin agt. Gouverneur*, 1 *Johns. Cases*, 492; *Embury agt. Connor*, 3 *Cow.*, 511, 522; *Wisson agt. Chamberlin*, 3 *Cow.*, 331; *Wilcox agt. Jackson*, 13 *Pet.*, 511; *People agt. Sturtevant*, 9 *N. Y.*, 263; *Bangs agt. Duckenfield*, 18 *N. Y.*, 597; *Fisher agt. Hepburn*, 48 *N. Y.*, 53; *Kinner agt. Kinner*, 45 *N. Y.*, 542).

The further question is raised by the defendants that the plaintiff has no standing for the reason that she has no judgment or lien against the premises sought to be reached, and hence that the action cannot be sustained. The defendants also cite a number of authorities to prove that "a creditor's bill" cannot be sustained without a judgment duly filed and docketed and an execution returned unsatisfied.

This is the rule without any doubt, and if the present action is not distinguishable from the cases mentioned, they must be considered as controlling, for the defense.

This action is not alone in aid of a common law judgment for the recovery of money. It is to remove a fraudulent conveyance alleged to have been made, substantially for the purpose of defeating the right of the plaintiff to a security by mortgage according to the direction of the order granting alimony, on a motion, made at the foot of the judgment for divorce, in the suit of *Kamp agt. Kamp*, in the New York superior court.

The superior court would never have attacked *Kamp* (or *Krall*) for a refusal to execute a mortgage on No. 6 Eliza beth street after the conveyance to Burgraff, on the conflicting ; evi-

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dence adduced at the trial of this action, as to her equitable right to the ownership of those premises.

The granting of an attachment for contempt in such a case would involve the trial of the whole issue of fraud, on a collateral motion, and would afford sufficient reason for denying the application. It may be truly said that the plaintiff would be remediless, as to the right to obtain the mortgage adjudged to be executed to her, if it be not within the province of a court of equity to inquire into the alleged fraud committed by Kamp (or Krall) in executing and delivering to Burgraff the deed in question. A court of law could not by any judgment or process known to those courts, create any lien against the said premises, charging them with the mortgage directed to be executed to secure the alimony. Perhaps an action at law could be maintained to recover a common law judgment for a quarter's alimony due under the order, and an execution issued thereon and returned unsatisfied, so that the plaintiff might maintain a creditor's bill, under the statute, to set aside the alleged fraudulent conveyance. But such relief would be very circuitous, and would not attain the remedy adjudged by the order for a mortgage to secure the alimony. I think it safe to hold that the plaintiff was remediless at law, and this fact is the first step towards maintaining jurisdiction in equity.

The jurisdiction of courts of equity to grant relief in cases of fraud and trust was not abolished by the statute which instituted a creditor's bill upon a judgment and an execution returned unsatisfied.

Courts of equity refuse relief except by a creditor's bill when that remedy might have been resorted to and maintained. But the cases are numerous where actions have been maintained to relieve against fraud, and where trusts have been declared as against fraudulent grantees or purchasers of lands or goods, in favor of creditors, or persons having only a quasi right or lien, without judgment or actual lien.

The case of *McCartny* agt. *Bostwick* (32 N. Y., 53) is a

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notable instance. The plaintiff there had no judgment or lien in this state, and no relief could be had at common law; an action in equity was maintained in favor of the plaintiff, declaring that the defendant, who had received a title to land from a third party, where the consideration had been paid by the debtor, held it in trust for the creditors of the debtor, and that the court in such a case could annul the deed, &c.

The principle is there distinctly maintained, that an action to set aside a fraudulent conveyance may be maintained by a creditor without judgment, who is otherwise remediless. Numerous cases are there cited to sustain the doctrine (*The Chautauqua Co. Bank* agt. *White*, 2 *Seld.*, 252).

The case of *Loomis* agt. *Tift* (16 *Barb. R.*, 541) is also cited in *McCartny* agt. *Bostwick* (*supra*), with approval. The case in 16 *Barb. Reports* was an action for equitable relief, in favor of a simple contract creditor, without any lien, against a voluntary conveyance made by the debtor with an intent to hinder and delay creditors.

The action was upheld on the ground that the plaintiff had no other available remedy. The debtor who made the fraudulent conveyance had died before the debt became due; his heirs could have no standing to attack the validity of the deed; the administrator could take no proceedings before the surrogate to sell the land, as the intestate did not own it; and an action against the administrator would be a vain thing, to which the creditors ought not, under the circumstances, to be required to resort (*Story's Eq. Jur.*, §§ 353, 369, 395).

These authorities seem to me to require that I should hold that the plaintiff has the right to maintain this action, for the reason that she has no other available remedy.

She has no other means of investigating the validity of the conveyance to Burgraff, nor of obtaining the mortgage security directed by the superior court to be executed. In confirmation of this position let us refer to some of the facts.

The title to the house and lot was taken by the defendant

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Kamp (or Krall) in 1856, and he continued to hold and occupy it without objection or claim on the part of Burgraff, for a period of about fifteen years, and until after the proceeding was instituted, at the foot of the judgment of divorce, for the allowance of alimony. Miss Burgraff knew of the pendency of the proceeding; and she paid no present consideration for the conveyance by Kamp which finally vested the title in her; nor did Kamp receive any consideration for executing his deed.

If Burgraff paid anything for the premises, it was paid at the time of the original purchase by Kamp, and the deed was taken by him to himself in fraud of her rights, while he was acting as her agent and paying her money. If the evidence before me sufficiently proves this fact, the case is with the defendants. The presumption is the other way, from the facts before referred to. The defense lies in overcoming this presumption by proof that the money paid by Kamp in 1856 to purchase the property, and afterwards in 1870 to satisfy an outstanding mortgage for \$2,000, belonged to and was furnished by her, for the special purpose of purchasing these premises for her own account. Miss Burgraff testifies, as a witness in her own behalf, positively to a state of facts sustaining the affirmative. She is corroborated by Heinrich Kamp, with whom she has been living, and, it must be inferred, performing the office of wife, since about the year 1853, and by whom she was first employed as a bar-maid at No. 158 Greenwich street, where he kept a boarding-house for girls and for the sale of lager bier; a house of prostitution or of some similar character. She states that he told her to carry on the place and she might have all that she could make; that she kept no bank account, but placed her money in a safe belonging to Mr. Kamp, which was in one of the rooms at the premises in Greenwich street. During this time, as appears from the evidence of Kamp, she made deposits to his credit at the Seaman's Savings Bank, having the money entered in his bank pass-book. It seems incredi-

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ble that Miss Burgraff should have kept the accumulations from the time she says that Kamp instructed her to carry on the business for her own profit, which must have been about 1853, until the purchase of the premises in 1856, nearly three years, at a house where it would seem to be exposed to many considerable risks of loss, and where it would draw no interest.

It was a most unsafe place to keep such a sum of money. It is also worthy of observation, that she never appears to have required Kamp to pay to her any of the money which she deposited to his credit in bank, if it was not in fact his money, but hers, which she so deposited. It appears also that Mr. Kamp collected the rents of the premises so purchased until May, 1860, four years, when he moved there as a residence; and that Miss Burgraff never exercised any act of ownership until the conveyance to her. The premises were purchased for \$6,050, and Miss Burgraff testifies that she furnished only something over \$4,000. She does not say how she expected that the further sum required to complete the purchase was to be raised, although it must be supposed that she knew that a further sum of \$2,000 was required.

Without keeping any bank account, she claims to have produced from her savings the further sum of \$2,000 in 1870, to pay off a mortgage given by Mr. Kamp at the time of the purchase in 1856. She did not execute it, so far as appears by the evidence. She claims to have learned in 1871, for the first time, that the title was taken by Mr. Kamp in his own name. She thus concedes that she did not pay down all the purchase-money, but says nothing of the manner in which the deficiency was made up; she paid off, in January, 1870, a mortgage made by Kamp, for part of the purchase price, but insists that she was ignorant that the title was not in her name till some time in 1870. Mr. Kamp also paid the taxes, as he testifies, several years, but he does not claim that Miss Burgraff furnished any money for that purpose. The coincidence by which Mr. Kamp draws a large sum from his bank

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account, June 16th, 1866, taking a deed of the premises dated on the same day, and on the 14th January, 1870, drew from his bank account \$2,000, and on the next day paid off his mortgage for that amount is worthy of notice, and is not satisfactorily explained.

Although the evidence of Miss Burgraff is corroborated by that of Mr. Kamp, Mr. Shaffer and Mr. White, as to furnishing over \$4,000 of the purchase price, I am constrained, from the extraordinary circumstances above referred to, to entirely discredit the evidence. It appears to me too improbable a story to be true.

I shall, therefore, direct judgment that the conveyances from Mr. Kamp to Schnieder, and from him to Miss Burgraff, be declared to have been made with the fraudulent intent of defeating the recovery of alimony by the plaintiff from Mr. Kamp and the security which he was required to give, and that the said conveyances are void, as against the plaintiff in this action.

That a receiver be appointed with authority to lease and to collect the rents and take charge of the property, and to pay therefrom the arrearages of alimony, and the costs directed by the order of the New York superior court and the costs of this action; and that the receiver continue to collect the rents and apply them to the payment of the said alimony as it becomes due, and after paying arrearages of alimony, and costs as aforesaid, and the costs of this action, and alimony thereafter as it becomes due, and the taxes, insurance and repairs, that he pay the surplus to the defendant, Magdalena Burgraff.

The defendant, Mrs. Burgraff, must have the privilege of executing and delivering to the plaintiff a mortgage to secure the bond of the defendant, Heinrich Kamp, directed by the order of the superior court, instead of the receivership, if she elects so to do by a notice in writing within thirty days from the filing of the judgment roll and notice thereof.

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N. Y. SUPERIOR COURT.

THE PEOPLE ex rel. AARON ADAMS agt. FRANZ SIGEL, Register, &c.

A resident *acting trustee*, his co-trustee having been absent abroad for a number of years, may receive payment of a mortgage and sign and acknowledge a satisfaction-piece thereof. And a *mandamus* will issue requiring the register to receive and file the satisfaction-piece and discharge the mortgage.

Special Term, October, 1873.

APPLICATION for a mandamus.

VAN VORST, J.—Under the peculiar circumstances of this case it cannot but be that the relator is entitled to have the mortgages satisfied of record.

There is but one acting trustee; the other is and has been absent abroad for many years. The relator was entitled to pay the mortgages, and the resident acting trustee was right in receiving the money. In so doing he was acting under powers incident to the trust.

The facts of the case indicate a concurrence of the absent trustee in the action of the resident trustee. Whether or not he be personally liable for the moneys received by the co-trustee, under the circumstances, is another question and not herein involved.

It is conceded that trustees differ from executors in regard to pains and liabilities. Executors may act severally in the sale and distribution of property of the estate, and in receiving and discharging claims. Trustees act jointly—certainly so in all matters which involve judgment and discretion.

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It may well be urged that the resident and acting trustee could not refuse to receive the money on the mortgages, when due and tendered. If not paid, it may have been his duty to enforce payment when due.

And, had he refused the money when due and tendered to him, he may have become personally liable, to some extent, to the *cestui que trust*. Under such circumstances, acknowledging receipt for the same would be a ministerial act, and which he could individually perform.

But however that may be, he having received the money and signed a satisfaction-piece of the same, the lien of the mortgages is gone, and they should be discharged.

This decision operates no further than the peculiar facts, conditions and necessities of this case, and is not to be regarded as any relaxation of the rules which apply to the powers or duties of trustees, or of the legal proof required by the register to satisfy mortgages provided for by the statute.

A mandamus should issue directing the register to receive and file the satisfaction-pieces and discharge the mortgages. But no costs should be allowed, as the register was justified in awaiting the order of the court before proceeding to cancel the mortgages.

Rice agt. Ehle.

SUPREME COURT.

JACOB RICE, respondent, agt. JOHN E. EHLE *et al.*, appellants.

In obtaining an order for the *discovery of books and papers*, it is improper to insert in it the consequences of not obeying it, such as that the defendants be precluded from making any defense, and their answer be stricken out, &c.

Such an order can only be made after the party is proved to be in default, and no benefit can result from inserting in it which of the several penalties will be inflicted if the discovery be not made.

But the insertion of such a provision, which seems to be sanctioned by Rule 16, cannot render the order for discovery irregular or invalid. It is simply an unnecessary provision and harmless. The provisions of the Code relating to discovery furnish no authority for inserting such a provision in the rule.

Although *special terms* are required to be held in the several counties, their jurisdiction is not limited to cases arising in the county or even the judicial district in which they are held. They have jurisdiction to hear and decide motions from any part of the state.

It is competent for counsel to agree to have a motion heard and decided at any special term in any county in the state, and the order made in it is reviewable, when made, in a county other than that designated by the Code, as if it were made in the proper county.

Fourth Department, Rochester General Term, April, 1873.

FACTS appear in opinion.

SMITH, BANCROFT & MOAK, *for appellant.*

F. F. WENDELL, *for respondent.*

MULLIN, *P. J.*—The plaintiff sued the defendants for negligence in making the milk furnished by him to them, as the proprietors of a cheese factory, in Herkimer county, into cheese.

The plaintiff applied to JAMES, J., for an order requiring defendants to make discovery of certain books and papers belonging to them or under their control.

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After hearing the parties, he made an order pursuant to the prayer of the petition presented to him, requiring the defendants to make such discovery, and that they give notice to the plaintiff's attorney of the time of making such deposit, and for a failure to comply with the order the defendants should be precluded from making any defense, and their answer should be stricken out unless defendants should immediately upon the expiration of the time allowed for making the discovery, apply to a justice of this court for an order for leave to show cause why this order had not been complied with, and the defendants' attorney was required to have his clients present before the judge making the order, for oral examination.

An order to show cause was obtained from DOOLITTLE, J., which was finally vacated by him, and an order made making the order of JAMES, J., absolute.

A motion was noticed on behalf of defendants for a special term in Lewis county, to vacate the orders above mentioned. By the agreement of counsel it was heard at a special term in Saratoga county, held by BOCKES, J., and it was denied, and from the order then made the defendants appeal.

It is not claimed but that the order of JAMES, J., was a proper one, so far as it related to the books, &c. But it is said that the provision prescribing the consequences of not obeying the order is unauthorized and void.

The proceedings to obtain a discovery of books and papers are prescribed by sections 60, 61, 62, 63, 64, 65 and 66, 3d R. S., 5th edition, 293, 294.

There is nothing in those sections that authorizes the insertion in the order for discovery the consequences of not obeying it. Section 65 provides that the court may nonsuit the party disobeying the order, strike out a plea or debar him from any particular defense in relation to which discovery is sought.

Such an order can only be made after the party is proved to be in default, and no benefit can result from inserting in

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the order which of these several penalties will be inflicted if the discovery is not made.

We have no means of ascertaining the reasons that induced the judges who framed the rules to insert such a provision in the 60th rule of the court, now rule 16.

But the insertion of such a provision cannot render the order for discovery irregular or invalid. It is simply an unnecessary provision.

The provisions of the Code relating to discovery furnish no authority for inserting the provision under consideration in the rule. If the insertion of such a provision in an order for discovery could affect its validity, we apprehend that the rule is confirmed and legalized by section 13 of chapter 408, of laws of 1870.

It declares that the rules adopted by the judges, now in force, should remain in force until altered or abolished by the judges authorized to revise the same.

But it is not necessary to invoke the aid of the statute to support the order. The provision declaring the consequences of disobeying the order is entirely harmless. As the defendants procured the insertion in the order of JAMES, J., the provision giving leave to apply to another judge for an order to show cause, they cannot be heard to complain of it now.

Technically, the papers on the motion before judge JAMES were filed within ten days from the time they were delivered to him by the judge, who for that purpose must, under the circumstances, stand in place of the clerk.

I entertain no doubt of the jurisdiction of the special term in Saratoga to entertain the motion to set aside the orders of judges JAMES and DOOLITTLE.

Although special terms are required to be held in the several counties, their jurisdiction is not limited to cases arising in the county, or even the judicial district in which they are held. They have jurisdiction to hear and decide motions from any part of the state. It is irregular to make a motion out of the district in which the place of trial is laid; except

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that it may be made in a county of another district adjoining the district in which the place of trial is.

It is competent for counsel to agree to have a motion heard and decided at any special term in any county in the state, and the order made in it is reviewable when made in a county other than that designated by the Code, as if it were made in the proper county.

The order of the special term is affirmed, with ten dollars costs.

My brethren concur in the result.

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SUPREME COURT.

JOHN W. LEA and others agt. JULIUS WOLF and HERMAN REISSING.

It is undoubtedly well settled that the *name of the place* where an article is manufactured and the *word* which is descriptive of the article manufactured may be used by any tradesman who there makes and vends the article.

But where the plaintiffs have a well known trade-mark, "Worcestershire Sauce," which is manufactured at Worcestershire, and has been for thirty years past, and the defendants manufactured an article at another place which they call "Worcestershire Sauce," and the imitation in colors, size, language and appearance of their labels and wrappers are irresistible proof of their intention to deceive the public and to lead purchasers to suppose that the defendants' preparation is the original made by plaintiffs, the defendants should not be protected in their fraudulent imitation by the pretense that in the words employed the name of a place and the word descriptive of the article only are used.

First Department, New York General Term, October, 1873.

Before INGRAHAM, P. J., FANCHER and BRADY, JJ.

APPEAL from so much of an order of special term as denied an injunction *pendente lite* restraining the defendants from employing the words "Worcestershire Sauce" as a trade-mark.

C. W. SANDFORD, *for plaintiffs.*

H. H. SHOOK, *for defendants.*

FANCHER, J.—The imitation of the plaintiffs' labels on the celebrated article of their preparation was so palpable that the learned judge at special term granted an injunction against the defendants, restraining such imitation. He, how-

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ever, held that in regard to the name—"Worcestershire Sauce"—"it contains nothing but the name of the place where it is manufactured, and the word 'sauce' as descriptive of the article sold," and that "neither of these words can be used in such a manner as to give the exclusive use of them as a trade-mark." The learned judge referred to several decisions as authority upon the point. Among them is a case decided by himself (*Wolfe* agt. *Goulard*, 18 *How. Pr. Rep.*, 64). That case has been cited with approbation in thirteen states of the Union. Perhaps the cases are so numerous as to establish a uniform current of authority in favor of the principle enunciated at special term.

But we are not called upon to extend the principle to a case where it is not strictly applicable. For the purposes of this case it is not necessary to deny that the name of the place where an article is manufactured and the word which is descriptive of the article manufactured may not be used by any tradesman who there makes and vends the article. That is not this case. The defendants' preparation is not manufactured at "Worcestershire;" the plaintiffs' is and has been for more than thirty years. The adoption, under such circumstances, of the very words contained in the plaintiffs' trade-mark, and the imitation in colors, size, language and appearance of their labels and wrappers, are irresistible proof of an intention of the defendants to deceive the public and to lead purchasers to suppose that the defendants' preparation was the original Worcestershire sauce, so long manufactured by the plaintiffs. Where such an intention exists, the defendants should not be protected in their fraudulent imitation by the pretense that in the words employed the name of a place and the word descriptive of the article only are used. The defendants, doubtless, might, under proper circumstances, employ the name of a place where an article is manufactured, as well as the word descriptive of its character; but such words must be employed honestly and properly, and not with a design to imitate and deceive to the detriment of another.

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Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use ; but where words, and the allocation of words, have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them, as a trade-mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued. In such cases injunctions have been sustained, though the name of a place, or of a celebrated person, were within the trade-mark protected by the injunction (*Messerole* agt. *Tyneberg*, 4 *Abbott, N. S.*, 410 ; *Matsell* agt. *Flanagan*, 2 *Abbott, N. S.*, 459 ; *Amoskeag* agt. *Spear*, 2 *Sandford*, 599 ; *Caswell* agt. *Davis*, 4 *Abbott, N. S.*, 6 ; *Newman* agt. *Alvord*, 49 *Barbour*, 588 ; *Wotherspoon* agt. *Currie*, 27 *L. Times, R. N. S.*, 393).

In the last-mentioned case the plaintiff had purchased from *Fulton & Co.*, of *Glenfield*, near *Paisley*, the good-will and trade-mark of their business. They had for several years prior to 1847 manufactured powdered starch, principally from *East India sago* ; and was called " *Glenfield patent double refined powder starch*," and commonly, " *Glenfield starch*." The plaintiff had actually removed his manufactory from *Glenfield* to *Maxwelton*, where the starch was made and sold, when he applied for an injunction against *John Currie*, trading as *Currie & Co.* *Currie* had rented a small building from *Fulton & Co.*, at *Glenfield*, where he manufactured starch, which was sold in packets similar in size and appearance to those of the plaintiff, and which he labeled " *the royal palace double refined patent powder starch, manufactured by Currie & Co., Glenfield*."

The plaintiff's case was that the defendant had taken the small building at *Glenfield*, and adopted the mark or label containing the name of that place, for the express purpose of inducing people to believe that his starch was the article made by the plaintiff. The vice-chancellor granted an

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injunction, although the defendant was an actual resident at Glenfield and his manufactory was there. It was dissolved on appeal, but reinstated and affirmed by the house of lords. The vice-chancellor said "That no man had a right to avail himself of a trade-mark, or to adopt any other means, whereby he should induce people to purchase his goods under the belief that they were purchasing the goods of another man;" and he was of opinion that "the defendant had pursued that course with the deliberate and fraudulent intention of palming off his starch upon the public as the starch of the plaintiff, and acquiring a sale of his starch by means of the connection and reputation of the plaintiff."

In *Newman agt. Alvord* (49 Barb., 588) it appeared that the plaintiffs for thirteen years had carried on business at the village of Akron, in the county of Erie, where they manufactured and sold cement, or water-lime, which they designated as "Akron cement," and "Akron water-lime." The defendants manufactured an article in Onondaga county, which they labeled "Alvord's Onondaga Akron cement or water-lime, manufactured at Syracuse, New York." They were perpetually enjoined from using the word "Akron" on their bills and labels, or in any other way in connection with the manufacture or sale of their cement or lime. The judgment awarding the injunction was affirmed at the general term, and also by the commission of appeals.

As a general rule, geographical names cannot be appropriated as trade-marks, but the rule has its exception where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trade-mark.

The order appealed from should be modified and the injunction extended so as to prohibit the use of the words "Worcestershire Sauce" on the bills, labels and wrappers of the defendants.

BRADY, J., concurs.

Kaiser agt. Hirth.

N. Y. SUPERIOR COURT.

MARIA KAISER, appellant, agt. VALENTINE HIRTH, respondent.

An owner of a tenement house is not liable to a person visiting one of the tenants for damages caused by falling down cellar steps opening upon the hallway, where it appeared that the opening was furnished with a good and sufficient covering, which was open at the time of the injury, in the absence of proof of defective or negligent construction, or that the defendant himself negligently left the opening uncovered.

The fact that the owner occupied the house in connection with several of his tenants raises no presumption of negligence against him. Each occupant is answerable only for his own negligence, and there can be no presumption against any particular occupant.

General Term, October, 1873.

Before MONELL, CURTIS and SEDGWICK, JJ.

THIS is an appeal from a decision at the trial term dismissing the complaint and ordering the exceptions to be heard in the first instance at general term with a stay of judgment.

F. KURZMAN, *for plaintiff, appellant*, cited *Sher. & Red. on Neg.* (56, 508, 509); *Eakin agt. Brown* (1 *E. D. Smith*, 44); *Anderson agt. Dickie* (1 *Robt.*, 238); *Congreve agt. Smith* (18 *N. Y.*, 79); *Freer agt. Cameron* (4 *Rich. [S. C.] L. Rep.*, 228); *Chapman agt. Rothwell* (*E., B. & E.*, 168); *Karl agt. Millard* (3 *Bosw.*, 591); *Carman agt. Eastern Co. R. R. Co.* (4 *Hurl. & Norm.*, 781); *Pickard agt. Smith* (10 *Com. Bench [N. S.]*, 470); *Godley agt. Hagerty* (20 *Penn. St.*, 387); *Irwin agt. Fowler* (5 *Robt.*, 482); *Southcote agt. Stanley* (1 *Hurl. & Norm.*, 247).

DAVID McADAM, *for defendant, respondent*, cited *Sher. & Red. on Neg.* (§ 5 and §§ 503, 504); *Curran agt. Warren*

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Chemical Co. (36 *N. Y.*, 153); *Terry* agt. *The Mayor* (8 *Bosw.*, 504); 4 *Abb.* [*N. S.*], 273; *Moore* agt. *Goedel* (34 *N. Y.*, 572), affirming 7 *Bosw.*, 571; *Robbins* agt. *Mount* (4 *Robt.*, at pp. 565, 566); *Mayor* agt. *Corlies* (2 *Sandf.*, 301); *Doape* agt. *Genin* (45 *N. Y.*, 119); *Cheetham* agt. *Hampson* (4 *T. R.*, 318); *Bolch* agt. *Smith* (7 *Hurl. & Nor.*, 736); *Southcote* agt. *Stanley* (1 *Hurl. & Norm.*, 249); *Robbins* agt. *Jones* (15 *Com. Ben.* [*N. S.*], 240); *Colles* agt. *Sheldon* (3 *Law, C. P. R.*, 495); *Sullivan* agt. *Waters* (14 *Jurist, C. L. R.*, 460); *Chantlier* agt. *Robinson* (4 *W. H. & G.*, 170); *Haunsel* agt. *Smyth* (7 *Com. Ben.* [*N. S.*], 731); *Gountrels* agt. *Egertoy* (*Law Rep.*, 2 *C. P.*, 370); 25 *L. J. Ex.*, 339); *O'Brien* agt. *Capwell* (59 *Barb.*, 497). As to propriety of nonsuit, *Gonzales* agt. *N. Y. and H. R. R. Co.* (38 *N. Y.*, 440); *Wilcox* agt. *Rome and W. R. R. Co.* (39 *N. Y.*, 365; 20 *N. Y.*, 73; 24 *N. Y.*, 430; 24 *How.*, 97; 2 *Duer*, 59; 3 *Robt.*, 25; 49 *N. Y.*, 177; 3 *Com. Ben.* [*N. S.*], 146; *Law Rep.*, *C. P.*, vol. 1, p. 300). Plaintiff should have asked leave to go to the jury (*Graham & Wat. on N. T.*, vol. 1, p. 281; 1 *Taunt.*, 10; 1 *Keyes*, 532; 37 *Barb.*, 244).

CURTIS, J.—The action is brought to recover damages for injuries sustained by falling through a trap-door, down a stairway, into the cellar of premises owned by the defendant and erected and used by him as a tenement house for many families, and which had been carelessly left open.

The defendant claims that the injuries sustained by the plaintiff were caused by negligence on her part solely.

The plaintiff went to the house to visit her son, who was one of the tenants residing on the premises, between eleven and twelve o'clock in the forenoon. About fourteen feet from the front entrance into the main hall a circular staircase rises from the side of the right-hand wall. At the further side of the staircase, and just beyond it, in a recess, on the same side of the hall, is a staircase descending to the cellar, which is used by the various tenants to descend to their respective por-

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tions of the cellar. This is covered by a trap-door which juts out about two inches into the hall, and was placed there to protect persons from falling down the stairway. The hall is lighted but obscurely from the entrance at each extremity. The trap-door being left open, the plaintiff stepped with one foot upon the stairs and the other into the open space where the trap-door should have been, if properly closed, and, falling, sustained injuries.

There was some conflict of testimony as to how dark the hall was at the time.

Although on the trial this stairway was described as a well-hole by one of the witnesses, and spoken of as a hatchway, yet, when covered with a trap-door, such description cannot be considered as technically correct.

The evidence in the case fails to show any defect or negligence in its construction, or that, when properly used, it does not suffice to protect persons having occasion to use the hallway and to be all that reasonable care and prudence can suggest.

The carelessness and negligence of tenants may convert almost any part or fixture of a building into a source of damage or injury to some one.

It is difficult to conceive of means that will prevent the consequences of their leaving doors open or gas or water flowing in premises that may be occupied by them, but for their negligent acts in these respects the law holds them responsible.

In the present case there is no evidence that the defendant, who occupied a part of the building, or any tenant of his, left this trap-door open. They are each liable for their respective negligence, and there can be no presumption of negligence against any particular occupant (*Moore agt. Goelt*, 34 N. Y. R., 527). The testimony fails entirely to show who left the trap-door open, or that the defendant allowed it to be open. It does not appear that it was constructed without proper care, or that its careful use would be productive of injury to

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any one. Such being the case it would be unjust to hold the owner of the premises responsible for the negligent use of it.

He discharged his duty to his tenants and their visitors when he made this provision for their protection, and which was safe unless carelessly used; he is not bound to protect them from the consequences of their careless acts in the course of occupancy.

It being entirely clear that it was safe if used with care, and there being no proof that the defendant left it open or caused or allowed it to be left open, the court properly dismissed the complaint.

The case of *Robbins* agt. *Mount* (4 *Robt.*, 565, 566) is directly in point, and the court there held precisely this view in respect to the liability of the owners of premises for the negligence of their tenants.

The exceptions to the decision of the court dismissing the complaint should be overruled and judgment ordered for the defendant on the verdict, with costs.

MONELL and SEDGWICK, JJ., concurred.

City of Utica agt. Blakeslee.

ONEIDA COUNTY COURT.

THE CITY OF UTICA, respondent, agt. CHARLES H. BLAKESLEE,
appellant.

Where a city charter contains a clause empowering the common council "To clean the streets and to pass ordinances requiring the same to be kept clean and in proper order and free from encroachment, incumbrance or *injury*," they have the power to pass an ordinance prohibiting, under a prescribed penalty, any person from using a wagon or cart on the paved streets for carrying a certain number of pounds or over for a load, unless the tires of such vehicle be of a certain prescribed width.

But where the ordinance, which fixes the penalty, directs also that the *expense of weighing the load* be added to the penalty, it is unauthorized. The penalty may be recovered, but not the expense of weighing.

November Term, 1873.

APPEAL from a judgment rendered on a trial before a justice of the peace and jury.

S. M. LINDSLEY, *for respondent.*

W. KERNAN, *for appellant.*

A. H. BAILEY, *Co. J.*—On the 3d of November, 1871, the common council of the city of Utica passed an ordinance to the effect that no person shall use, cause, or suffer to be used, any wagon, cart or other vehicle upon any paved or improved street within the city limits, to carry 4,000 pounds or upward, unless the tires upon such vehicle shall be at least four inches in width, or to carry over 2,000 pounds and less than 4,000 pounds, unless the tires shall be at least three inches in width, and imposing a penalty of fifteen dollars for each violation of said ordi-

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nance. It also authorized the mayor or any alderman or policeman, when he suspected any person of violating this ordinance, to require the load of said person to be weighed, and if found to exceed the limit above specified such person shall pay the expense of weighing and the amount shall be added to the above penalty.

Defendant was sued before L. B. Hastings, Esq., a justice of the peace of the city of Utica, and a jury, May 30th, 1872, for a violation of said ordinance, and the trial resulted in a judgment against the defendant for fifteen dollars damages and eleven dollars and eighty-five cents costs. On the trial it appeared that defendant's team was found in front of the Butterfield house, on Genesee street, in said city with a load of coal upon a wagon; a policeman required the driver to take his load to scales where it was weighed, during which process the coal was unloaded, and the coal upon the wagon was thus ascertained to be 4,100 pounds. That the tire of the wagon was not four inches in width but was about two inches, the usual width of the tires of lumber wagons. It was conceded that Genesee street was a public street of said city and that the same was paved. It was also conceded that Genesee street had been a public highway long before the incorporation of said city.

The defendant moved for a nonsuit, on the grounds among others, that the ordinance was void; the city having no authority to enact it, because the ordinance imposed more than a penalty, viz., the expenses of weighing a load, and because the ordinance was in restraint of trade and unreasonable.

The motion was denied and these questions come here upon appeal.

The second subdivision of section 79 of the charter of the city of Utica (*Laws of 1862, chap. 18*) empowers the common council of said city "to clean the streets and to pass ordinances requiring the same to be kept clean and in proper order, and free from encroachment, incumbrance or *injury*."

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The authority to pass the ordinance in question must be derived from this provision of the charter, if it exist at all.

I think the ordinance is warranted by the charter.

The word *injury* is a comprehensive word. It includes any wrong or damage done, any detriment or diminution of that which is good or valuable, and it is this, from which the common council is empowered to keep the streets free. This does not mean that the streets shall be kept free from ordinary use, because such ordinary use will in time wear out the pavement and thus injure the street in a certain sense. But it does enable the common council to prevent the streets from being used in an unusual manner and in such a way as will especially injure the pavement thereof. The common council in such a case is the proper judge as to what is or is not an injury (*Dillon on Municipal Corporations*, 284, note).

The only restraint upon them in such a case is that the ordinance must be reasonable and not an unwarrantable restraint of trade. I cannot say that the ordinance in question is obnoxious to either objection. No amount of load is forbidden. It only prescribes the minimum width of the wagon tire when the load exceeds a certain unusual weight. This is regulating and not forbidding any kind of vehicle in the streets.

This view I think sustained by the following cases: 3 *Pick.*, 461; 6 *Pick.*, 190; 2 *Cush.*, 571.

The defendant cites the following cases in support of his positions: 5 *Cow.*, 462; 2 *Hill*, 77; *Lalor's Sup.*, 146; 7 *Paige*, 261.

In the first case (5 *Cow.*, 462), it was held that the provision of a charter which allowed the trustees of a village to make by-laws relative to hucksters, and to pass such prudential by-laws for the good government of the village, &c., as they may deem necessary, not inconsistent with the laws of the state or the United States, did not authorize them to pass a law that hucksters should take and pay for a license of

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the trustees under a penalty, especially when it does not appear, expressly, that prudence required the by-laws. In short, it was held that the trustees had no power to pass the by-law under their charter. In this case I hold that the charter authorizes the by-law.

In the case 2 *Hill*, 77, it was held that the charter of the village authorized the trustees to cause the sidewalks of the streets in said village to be improved, and to compel the owner and occupants to make such improvements, and, in case of refusal, to do the work and charge said owners, &c., did not empower them to assess the improvement of a *street* upon the owners, &c. The case in *Lalor's Sup.*, 146, holds that a provision in a charter authorizing the common council to regulate the vending of meats, vegetables and fruits, pickled and other fish, and to prescribe the time and place of selling the same, did not warrant the passage of an ordinance imposing a fine for the sale of putrid provisions. The defendant was fined for selling rotten eggs. 7 *Paige*, 261, decides that an ordinance of the city of Hudson, which forbid, under a penalty, the erection of wooden barns, stables or hay-presses within certain specified limits in said city, was void, not being authorized by the charter, and because the ordinance did not apply to all the citizens of Hudson alike.

I do not see that any of these cases sustain the defendant on this appeal. The part of said ordinance which directs the expense of weighing to be added to the penalty, I do not think is authorized by the charter and is therefore void.

The amount is uncertain, and I do not think a penalty can be imposed in that way, even if at all, in such a case.

But it is not necessarily connected with the thing forbidden and the imposed penalty. I hold it alone void, and the rest of the ordinance good (*Dillon*, 347, *page*; 6 *Gray*, 596; 1 *Wend.*, 237); and judgment was alone rendered for the actual penalty.

Therefore, judgment affirmed, with costs.

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affirmed
July 25th
1874

N. Y. COMMON PLEAS.

THE PEOPLE *ex rel.* JAMES RYAN agt. ANDREW H. GREEN,
 Comptroller, &c.

It is an old and well settled principle that no person can hold incompatible offices.

Offices are said to be incompatible and inconsistent so as to be executed by the same person: 1st. When, from the multiplicity of business in them, they cannot be executed with care and ability; or, 2d. When, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty.

It has been invariably held that the incumbent of two offices which bore no relation subordinating one to the other were not incompatible.

The *relator*, by accepting the office of *member of assembly*, did not thereby vacate his office of *deputy clerk of the special sessions*; the two offices were not incompatible.

A *mandamus* to compel the comptroller to pay the *relator's* salary during the months he acted as member of assembly, ordered.

Special Term, October, 1873.

THE *relator* was appointed, on May 1, 1870, deputy clerk of the court of special sessions of the peace for the city and county of New York, pursuant to the act, chapter 383, laws of 1870, and reappointed as such deputy clerk under the provisions of the act, chapter 373, laws of 1872. While such deputy clerk he was, in November, 1872, elected a member of assembly for the year 1873, and accepted such office, and served as a member of the legislature of the state during the months of February, March, April and May, 1873. The comptroller of the city and county of New York refused to pay him salary as deputy clerk of the special sessions during said months, on the ground that he vacated the office of deputy clerk by accepting that of member of assembly.

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RICHARD O'GORMAN *and* WILLIAM F. McNAMARA, *for the relator.*

E. DELAFIELD SMITH, *corporation counsel, for the comptroller.*

J. F. DALY, *J.*—No provision is found in the constitution or in the statute law of this state to that effect; but it is claimed that, at common law, the two offices are incompatible, and the acceptance of the last vacated the first. The principle is an old and well settled one that no person can hold incompatible offices. According to an early authority incompatibility as to office is divided into two classes. "Offices are said to be incompatible and inconsistent so as to be executed by the same person, first, when, from the multiplicity of business in them, they cannot be executed with care and ability; or, second, when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty" (4 *Inst.*, 100, *Bac. Abr.*; *tit. Office, K*). Among the multitude of cases reported containing adjudications as to what constitutes incompatibility in offices, illustrations are found of the latter class, and none whatever in the former. Indeed, where the question arose concerning the incumbent of two offices which bore no relation subordinating one to the other, it has been invariably held that they were not incompatible. The cases of adjudged incompatibility may be briefly stated.

In *Rex agt. Pateman* (2 *Term R.*, 777) the defendant held the offices of alderman and town clerk. These were held to be incompatible, because the clerk was a ministerial officer in the court held by the aldermen, and because the accounts of the clerk were audited by the aldermen.

In *Verrier agt. The Mayor of Sandwich* (1 *Sid.*, 305, 2 *Keb.*, 92) the defendant was mayor and town clerk, and the offices were declared incompatible, because the former was a judicial and the latter a ministerial office in the same court.

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The clerk might be fined by the court of record held by the mayor.

In 4 *Inst.*, 310, the cases are cited of a forester by patent for life who was made a justice in Eyre for the same forest, and of a warden of the forest made justice in Eyre of the same forest. These were adjudged incompatible, because it was the duty of the justice to judge the acts of the forester and the warden; and, therefore, both offices should not be held by the same person.

In *Dyer's Case* (*Dyer*, 158, 6) a justice of the common pleas was made justice of the king's bench, and these offices were said to be incompatible, because the duty of the latter court was to correct the errors of the former.

In the case of *Blissell* (*note to Rex agt. Godwin*, 1 *Doug. R.*, 397), where one attempted to hold the offices of alderman and of chamberlain, in the same municipal corporation, it was held that the offices were incompatible because the aldermen were to audit the chamberlain's accounts; and, in holding both, the defendant would have to supervise his own acts. The case of *Millwood agt. Thatcher* (2 *Term R.*, 82) illustrates the same principle, although it is not, strictly speaking, an authority on the point, because the discussion of the question of incompatibility was not necessary to the determination of the case, and was so stated by all the judges—by ASHURST, J., particularly, on whose dictum much stress is laid in opposing the claim of the relator in this court. Thatcher was one of twelve jurats or aldermen of the borough of Hastings; any two of the jurats, with the mayor, might hold the court of record for the borough. Thatcher was elected town clerk, and assumed to hold both offices, although the town clerk was clerk of the court holden by the jurats, and he was thus a judicial and ministerial officer in the same court. He urged that, as there were twelve jurats and any two might hold the court, he would possibly never be called on to sit. ASHURST, J., said that it was not necessary to decide the question of incompatibility; but, if it were, he

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should say that the offices were incompatible because there might be cases where it would be absolutely necessary for him to act as jurat, as in case of the sickness of all the others; and if there were one possible case in which he might be called upon to act, that was an answer to the argument. BUTLER, J.: That as the charter of the borough provided for a mayor, twenty-four jurats and a town clerk, the corporation could not reduce the number by consolidating two of the offices. GROSS, J., put his decision in favor of the defendant because the action was brought to test the right to the last office accepted; that of town clerk. Judgment in the case was unanimously given for the defendant Thatcher, the court saying that if the offices were compatible he was rightfully in the second office; and if they were incompatible he was also rightfully in the second office because the acceptance of the last office vacated the first held. This case, in fact, stands as authority on the last point alone, for it definitely settled which office was vacated if a person accepted two incompatible ones. The principle was first adopted in *Rex agt. Trelawney* (3 Burr, 1615) that, whether the last office were superior or inferior to the first, the first was the one vacated. And this is the rule to this day in England and America. This much attention has been given to the case of *Milward agt. Thatcher* because the dictum of ASHURST, J., above quoted—to the effect that if an occasion might ever arise where an incumbent of two offices was called on to perform the duties of both at the same time, the offices were incompatible—is, as a general proposition, likely to mislead. In the first place it was not an enunciation of any principle involved in the decision of the case; and in the next place the incompatibility of the offices held by Thatcher arose solely from their relation to each other in the same court; one being subordinate and ministerial, and the other judicial. And this view of that case is expressed in a later English case (1830, *Rex agt. Jones*, 1 Barn. & Ald, 677), LITLEDALE, J., speaking of it and two others cited above, saying: “*Verrier agt.*

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Mayor of Sandwich, Milward agt. Thatcher, and Rex agt. Pateman are clearly distinguishable from the present case. The offices of mayor, of jurat and of alderman, in those cases, were judicial, and, therefore, incompatible with that of town clerk; and in the latter case the town clerk's accounts were audited by the aldermen."

In *Rex agt. Patterson* (4 B. & Ald., 15), where the defendant, being an alderman and justice of the peace, was appointed county treasurer, it was intimated by the court (1832) that the offices were incompatible, because the treasurer was a ministerial officer under the justices, and had to deliver in his accounts to them.

In *Rex agt. Tizzard* (9 B. & C., 421) the defendant was clerk of the borough of Weymouth, and also alderman. The offices were held to be incompatible, because, says lord TENTERDEN, the clerk was removable by the aldermen for neglect of duty, and he would have a vote on his own removal, thus filling the incompatible offices of master and servant; and so, because he would, as alderman, have a vote on his own salary as clerk. BAYLEY, J., said he thought two offices were incompatible where the holder cannot in every instance discharge the duties of each; and in the two questions of a motion and salary the town clerk is not competent to discharge the duty of an alderman.

The illustration here given by BAYLEY, J., shows that his remark does not apply to the physical ability of the incumbent to discharge the duties of each office in every instance, but to the impropriety and impolicy of permitting him to do so. Even if a wider application be given to it, it would not, as other cases in England and America show, apply to cases where the incumbent of two offices has a deputy or assistant to perform the duties of one while he is personally employed in the other. It will be perceived that in all the cases reviewed the offices declared incompatible are such as bear a special relation to each other; one being subordinate to and interfering with the other so as, in the language of COKE, to

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induce the presumption that they cannot be executed with impartiality and honesty. And there are no cases of adjudged incompatibility involving any other principle.

The books, on the other hand, contain many cases where two or more offices held by the same person are declared not to be incompatible, but rightfully enjoyed.

In *Rex agt. Trelawney* (3 Burr, 1615) the defendant held the offices of steward and capital burgess of the same corporation, and the court refused to oust him because the offices by custom had been held together for a hundred years back. This authority for one incumbent holding two offices, arising from custom or usage, is discussed and recognized in cases referred to below. .

In *Rex agt. Jones* (1 B. & Ald., 677) the defendant was chosen town clerk of the borough of Carmarthen, and afterwards elected councilman, and held both offices. It was the duty of the town clerk to attend the meetings of the common council and record their proceedings, and also act as prothonotary of the court of record of the borough.

The defendant acted as councilman, voting, &c., and immediately afterwards acted as town clerk, recording the proceedings. Lord TENTERDEN said that the offices were not incompatible; but if the person filling the offices were in relation of master and servant they would be. LITLEDAL, J., concurred, because the common council had no power to regulate the fees of the clerk. TAUNTON, J., said that no particular rule could be laid down; but every case of incompatibility must depend upon its own particular circumstances. The judges in this case distinguished it from those of *Rex agt. Pateman*, *Verrier agt. Mayor of Sandwich*, and *Milward agt. Thatcher* (*supra*), because, in those cases, the defendants assumed to hold offices, the duties of which were respectively judicial and ministerial, and therefore incompatible.

In the United States the common law doctrine of incompatibility of offices has been fully recognized; but the cases

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under it show that the mere fact of one incumbent holding two offices does not vacate the first unless there is incompatibility arising from the nature of the offices and their relation to each other, or from the necessity of the incumbent performing the duties of both offices at all times in person and not by deputy.

In the *State of Missouri* agt. *Moore* (48 *Mo.*, 242) the relator was county clerk, and afterwards elected clerk of the circuit court. It was held that the offices were not incompatible, although the duties would have to be performed at the same time in different places, because they might be performed by deputy. If the duties were necessarily personal the offices would be incompatible; and, finally, that as the offices had been held by one person from the earliest history of the state, and the legislature, while declaring other offices incompatible, were silent as to this, such tacit approval of the practice must have great weight. The case of the *State of Missouri ex rel. Owens* agt. *Draper* was cited; but in that case the incompatibility was adjudged under special provisions of the state constitution and the laws of Missouri.

In *Bryan* agt. *Cattell* (15 *Iowa*, 550) the plaintiff was district attorney of the county, and accepted a commission as captain in the volunteer service of the United States, and absented himself on active duty from his office. It was held by the court that the office of district attorney was not vacated by accepting the other; and that incompatibility of office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both. It does not necessarily arise where the incumbent places himself, for the time being, in a position where it is impossible to discharge the duties of both offices.

The brief review here given will show the tendency of the cases on the question of incompatibility. Lord MANSFIELD said, in *Rex* agt. *Gayer* (1 *Burr*, 245), "that the general questions concerning the incompatibility of offices are a large

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field indeed ;” and it seems difficult to judge every case by an inflexible rule, or to do more than follow the suggestion of TAUNTON, J., in *Rex* agt. *Jones* (*supra*), and judge every case by its own particular circumstances. The office of deputy clerk of the court of special sessions is not, as its name might indicate, a subordinate office, whose powers and duties are those delegated by the clerk of that court. The name is a mere distinguishing appellation of an office equal in its functions in all respects to that of clerk of the court of special sessions. The two officers are appointed by the same authority for the same term, take separate oaths of office, and file separate official bonds. They are wholly independent of each other as to duties ; all those performed by the deputy clerk are such as are to be performed by the clerk, although there are special duties to be performed by the clerk alone.

If the two officers be present at the same time there are duties but for one, and, in the absence of the deputy clerk, the clerk may perform all the duties (*Laws of 1858, chap. 282*). The absence of the deputy clerk, therefore, does not impede the performance of the duties of that office by the clerk.

Nor is it because the relator is called “deputy clerk” that duties cannot be performed by an assistant. His powers are not delegated from the clerk, but are derived directly from the statute ; and whatever power the clerk might delegate the deputy might equally.

If the clerk accepted the office of member of assembly, and could answer objections thereto that all the duties of clerk were performed by the deputy clerk, or such as acted for him, and no inconvenience had ensued or could ensue, the deputy clerk may well urge that in his absence all the duties of their common office were performed by the clerk ; and it is not necessary that he should at all times be present in person, there being a common duty for him and the clerk that can be performed but by one at a time.

The office of deputy clerk is held for a term of six years ;

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that of member of assembly for one year, with a term of service not contemplated to extend beyond a hundred days (*Constitution* 1846, article 3, § 6), and seldom extending longer than five months, making, in the case of the relator, but a temporary absence for a short period compared to his term of office as deputy clerk. That the duties of member of assembly have to be performed at Albany does not affect the question in this case, since there is an officer in New York to perform the duties imposed on the deputy clerk of the court of special sessions; and no more hazard to public interests is occasioned than in the very frequent cases where an assistant or deputy is left to exercise the powers of the principal officer in his absence.

Neglect of duty by an officer, absence from the place where the duties of his office are to be performed, non-user of powers or abandonment are not modes of vacating an office in this state; but, if unjustifiable, are grounds for removing him from office by the proper authority. The rule in other states appears to be the same. In the case of *Page* agt. *Hardin* (8 *B. Monroe*, 648, 666, *Kentucky*), where the secretary of state, in violation of an express statute, persistently absented himself from the seat of government and left the performance of his duties to an assistant, it was held that he had not vacated his office. In the case of *Bernard* agt. *City of Hoboken* (3 *Dutcher*, 412) the fact that a local officer of that city left the state of New Jersey, went west, remained away for a considerable time, with some evidence of intention to stay away permanently, was held not to be, at law, a vacation of his office; but it was left to the jury to say if there was an intention on his part to relinquish or abandon it.

In this state the vagueness of the common law rule has been in a measure limited by statute. A local office becomes vacant if the incumbent ceases to be an inhabitant of the district, county, town or city for which he shall have been chosen or appointed, or within which the duties of his office are required to be discharged (1 *R. S.*, 122, 34, § 4); and no

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other abandonment or relinquishment is provided for by law. There is, of course, no question of the authority of the proper tribunal to remove a local officer from office for non-performance or neglect of duty, even if such neglect arise from his acceptance of another office compatible with the first, such authority being always reserved for the public good.

But the sole question before me now is whether the relator, by accepting the office of member of assembly, thereupon absolutely vacated his office of deputy clerk of the special sessions, upon the ground that the two offices were incompatible. My conclusion is to the contrary.

1st. Because there necessarily need be no neglect of duties of the office of deputy clerk for the short period that the relator might be required to be absent attending the sessions of the legislature; there being another officer present to perform all those duties.

2d. The appointment by law of a clerk and deputy clerk, two officers of equal authority, to perform the same duties, one only being needed to perform them at one time, having in contemplation the absence at times of one of such officers, and evidencing an intent that the personal presence of both is not at all times necessary.

3d. And for the further reason that the custom or usage in this state has been for local officers to hold as well legislative or *quasi* legislative offices, the duties of which are to be performed at the capital of the state. That such custom or usage is to be considered as authority for the practice has been shown above (*Rex agt. Trelawney*, 1 *Burr*, 1615; *State of Missouri agt. Moore*, 48 *Mo.*, 242). Such custom in this state has been attended by a silence on the subject in the statutes, which, according to the last case cited, evidences the approval of the legislature, and must be considered in determining the question. Such usage follows that which has also prevailed in England; local officers there being elected to parliament, and special statutes having been enacted to provide which local officers shall not be eligible to serve

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in parliament, all other persons being eligible (*Jacob's Law Dict., tit. Parliament, 6 B*).

In this state not only have local officers been elected to both houses of the legislature, but there is even higher authority in the cases of certain local officers accepting offices of a legislative character, the duties of which interfered with the performance of their local duties. I allude to the delegates to the several constitutional conventions of this state. In the convention of 1866-7 nearly one-fourth of all the delegates held local city, county or town offices, of a judicial, legislative or executive character. The chief justices of the three superior courts in different counties of the state, other judges of the same courts (in one instance the whole bench), surrogates, justices of inferior courts, members of the boards of education, officers of city and county departments of different localities, were all members of that convention.

In the convention of 1846 many delegates were local officers; and in the convention of 1821, the chancellor was a delegate. In every case there was, necessarily, a suspension of other official duties during the very long sessions of the conventions, which extended over a longer period than a session of the legislature. The duties of delegate were as multifarious and engrossing as those of member of assembly, and had to be performed at Albany. There was, necessarily, loss of service to the public in the non-performance, by such delegates, of their local duties, especially in the case of judicial and other officers whose powers could not be delegated. If the argument of the respondent is correct, it follows that all these officers vacated their offices when elected to the constitutional conventions, since such offices were far more obnoxious to the charge of incompatibility than those held by the relator, Ryan.

4th. The offices of the relator are not incompatible, as having any such relation to each other as suggests that they could not be performed by the same person with honesty and impartiality. This was expressly conceded on the argument.

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It was also conceded that no inquiry was to be made into the performance by the relator of his local duties while acting as member of assembly (*Charter, Laws of 1873, chap. 335, § 29*). But the sole objection to the relator's claim is based on what the counsel for respondent termed the "physical incompatibility" of the relator's offices, arising from the assumed fact that the duties of each required his presence in different places at the same time.

This question was considered by the supreme court at special term at the application of the same relator for the same salary, and the learned justice who presided was of opinion that the offices were incompatible; but as that point had not been suggested nor argued by counsel before him, he gave leave for an alternative mandamus in order that the relator's counsel might be heard upon it.

The alternative mandamus has been applied for and issued from this court without objection, and the return made by the comptroller to the writ raises the question here discussed, counsel having been fully heard upon objection to the sufficiency of the return. The opinion delivered by the learned justice of the supreme court appears to hold that the relator's offices were incompatible upon the dictum of ASHURST, J., in *Milward agt. Thatcher (supra)*, and upon the assumed facts that if the clerk fell sick the presence of the deputy would be indispensably necessary to perform their duties in the court; that the statutes contemplated the existence of duties requiring the presence of both clerk and deputy for their effectual performance; that the duties of one office required the relator's presence in Albany, and of the other in New York, while both were to be discharged in person.

As to the case of *Milward agt. Thatcher*, the construction placed upon it by the English courts, and the weight it is entitled to, are discussed above. As to the contingency of the clerk falling sick; leaving no one to perform the duties of deputy clerk, it might arise in every case where duties are either personal or delegated; but can hardly, in the latter

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case, be urged as a reason why the officer and the deputy must always be present to anticipate each other's illness or incapacity to act personally in performance of the duties of the office. No officer could in that case ever absent himself or hold another office, even while he had a deputy. Nothing in the language of the statute seems to me to intend that there are any duties for clerk and deputy to perform jointly, or requiring the presence of both. It would rather seem that the creation of the two offices, to perform duties which the incumbent of either can fulfill, contemplates the contingency of the occasional absence of one of them.

Finally, no duties can require personal performance in every instance by any officer when another person is clothed by law with full authority to perform them.

It is with diffidence and reluctance a conclusion is here reached differing from the views of the learned justice of the supreme court; but it has been my advantage to hear counsel discuss with care and elaboration the particular point in controversy. So far as the propriety of any two offices, compatible or incompatible, being ever held by one person at the same time is concerned (save in possible exceptional cases of extreme importance, where the interests of the state temporarily demand special experience and ability), it is impossible not to see the force of COKE's opinion, that it were better they should not be, as tending to the greater honor and dignity of office and greater benefit to the public. But my views as to the propriety cannot affect the law as I find it; and I must conclude that the relator did not vacate his local office by accepting that of member of the legislature.

The return is insufficient, and mandamus must issue.

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SUPREME COURT.

ELIZABETH PATTERSON agt. JANE W. McCUNN and others.

In actions for the *partition* of real estate the right of the plaintiff to be an *owner* should be clear to warrant the court to take the custody of the property out of the possession of those having an apparently valid title. Where the executors and trustees are vested with that right under a will, while the claim of the plaintiff, as an heir-at-law, is doubtful and uncertain, her motion for an *injunction and receiver* pending her action for partition will be denied.

Where application is made in such action to remove the trustees on the ground of incompetence or improvidence, upon affidavits founded in a great part on information and belief, which are unequivocally denied on behalf of the trustees, there is no propriety in granting the motion on such a state of the testimony, nor in trying such a question in the action on conflicting affidavits.

New York Special Term, August, 1873.

THIS action is brought to obtain partition of certain real estate of the late John H. McCunn, deceased, upon the ground that certain provisions of his will are inoperative and void. The prayer of the complaint is for an injunction and receiver and other relief. The injunction was granted, attended by the usual order to show cause.

CHRISTOPHER FINE, *counsel for plaintiff*, stated as facts that John H. McCunn died on the 6th of July, 1872, leaving a will, in which he, *first*, directs payment of his debts; *second*, directs the erection of a tomb in Ireland; *third*, bequeaths the house in which he lived at the time of his death, together with the furniture, plate, &c., to his wife; *fourth*, gives his property in Ireland to his two brothers, James and Thomas; *fifth*, "gives, devises and bequeaths to his executor

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and executrix, and the survivor of them, all the rest, residue and remainder of his estate, both real and personal, in America, in trust," and directs that "they shall take possession of the same, and collect the rents, issues and profits thereof; and out of the proceeds of the same, *for six years* after my death," shall pay certain bequests therein named; and further directs that such bequests "shall continue for the said term of six years after my death;" and further directs that "at the end of six years, as aforesaid, or within a reasonable time thereafter, the said executors shall sell and dispose of all my estate, both real and personal," and after the "sale" that they shall divide the "proceeds of the same" amongst his "heirs or next of kin, or to those whom he may direct."

Then follows his direction how the "proceeds" of the sale of his said property may be divided after the said six years. *Sixth.* He nominates as his executor and executrix Thomas and Jane W. McCunn.

To the body of the will the testator adds two codicils, in the first of which he, 1st, increases certain annuities mentioned in the fifth clause, and makes them payable during the lives of three persons, namely: Mrs. Long, Mrs. Barnet and Mrs. Lecky; 2d, devises a small farm in New Jersey to his sister Jane; 3d, again increases bequests to Mrs. Long and Mrs. Barnet, mentioned in the fifth clause of the will, from \$3,000 to \$5,000, and adds that, "if my aunt, Eliza Lecky, is alive at the distribution of my estate, or when her annuity ceases, I then give her a legacy of \$1,000, in addition to the annuities she may have had."

In the second codicil he bequeaths to John McC. Gano and Jane W. Gano "\$500 per year until the final distribution of my estate;" and at such final distribution he gives to each of the said last named parties, in lieu of the \$500, \$5,000 absolutely. He then nominates James M. Gano as one of the executors.

The plaintiff is one of the daughters of Mark McCunn, a half-brother of the deceased, on the paternal side, and claims

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as an heir-at-law. The plaintiff claims that the fifth clause of the will and all legacies and bequests to be paid therefrom are void, because, among other reasons, the absolute power of alienation of the real estate and its proceeds and the ownership of the personal property is illegally suspended, being suspended for at least the absolute and fixed period of six years and even longer, in the discretion of the trustees, and may be for a longer period than two lives in being at the creation of the estate, and that thus the power of alienation is suspended, *not upon lives*, but upon a *fixed period of time*, and that the first codicil adds a further suspension of three lives in being, &c.

The plaintiff brings this action, under the statute of 1853, authorizing an heir out of possession to prosecute for partition, &c., and also in contemplation of the general equity powers of the supreme court.

On the first point, in relation to the power to construe a will, and in connection therewith to appoint a receiver and order an accounting and direct a partition, and, if necessary, a sale, is inherent in a court of equity, cited *Scott agt. Gurnsey* (60 *Barb.*, 163, 165, 167, 173, 178; *affirmed in* 48 *N. Y.*, 106 [*A. D.* 1871]); *Story's Eq. Jur.* (§§ 646 to 648). And in relation to the provisions of the laws of 1853, *cited that statute*, §§ 1, 2; *also* 2 *Crary's Special Proc.*, 96, 117.

Second. In relation to the trust sought to be created by the fifth clause of the will being void, because it unlawfully suspends the power of alienation of the real estate, and also the absolute ownership of the personal property of the deceased, cited the enactments of 1 *Rev. Stat.*, 672 (*Edmonds' ed.*; or, 3 *Rev. Stat.*, 11 [5th ed.], §§ 14, 15, 16, 21, 22, 41, 44, 55, 75, 79, 82, 84); *Jennings agt. Jennings* (7 *N. Y.*, 547); *Hawley agt. James* (16 *Wend.*, 61, 121); *Amory agt. Lord* (9 *Wend.*, 404, 415, 416); *Taylor agt. Gould* (10 *Barb.*, 388, 398, 400); *Yates agt. Yates* (9 *Barb.*, 329, 338, 339, 341, 344, 346, 347); *Costar agt. Lorillard* (14 *Wend.*, 265, 312); *Bascom agt. Albertson* (34 *N. Y.*, 584, 609 to 612); *Williams agt. Wil-*

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liams (8 *N. Y.*, 525); *Hawley* agt. *James* (5 *Paige*, 445); *Amory* agt. *Lord* (5 *Seld.*, 403); *Knox* agt. *James* (47 *N. Y.*, 390, 396); *Booth* agt. *Field* (2 *B. & Ald.*, 564); *Schettler* agt. *Smith* (41 *N. Y.*, 328); *De Kay* agt. *Irving* (5 *Denio*, 646, 652); *McSorley* agt. *McSorley* (4 *Sand. Ch.*, 414, 416); *McSorley* agt. *Wilson* (4 *Sand. Ch.*, 515, 525); *Field* agt. *Field* (4 *Sand. Ch.*, 528, 546, 551); *Moore* agt. *Moore* (47 *Barb.*, 257, 258, 260); *Brown* agt. *Evans* (34 *Barb.*, 595, 605).

Third. There is no power in the court to preserve or modify the trust, but the whole trust and property and legacies mentioned in the fifth clause fails (3 *R. S.*, p. 22, § 84; *Hawley* agt. *James*, 16 *Wend.*, 65, 121, 122, 164, 166, 174, 175, 176; *Costar* agt. *Lorillard*, 14 *Wend.*, 265, 312, 317; *Savage* agt. *Burnham*, 17 *N. Y.*, 561, 569, 570, 576; *Tucker* agt. *Tucker*, 5 *N. Y.*, 417, 418; *Morton* agt. *Morton*, 8 *Barb.*, 21; 4 *Kent's Com.*, 325, 337, 351, and cases cited; *Harrison* agt. *Harrison*, 36 *N. Y.*, 548; *Amory* agt. *Lord*, 4 *N. Y.*, 411, 419, 420; *Matter of Thomas Estate*, 1 *Tucker's Sur.*, 367, 370; 1 *R. S.*, 729, § 60; *Knox* agt. *James*, 47 *N. Y.*, 390, 399; *McSorley* agt. *Wilson*, 4 *Sand. Ch.*, 515 to 525; 3 *R. S.*, p. 16, § 55, and page 21, § 79, p. 28, § 148; *Post* agt. *Hover*, 33 *N. Y.*, 106, *id.*, 601; *McSorley* agt. *McSorley*, 4 *Sand. Ch.*, 414, 416; *Field* agt. *Field*, 4 *Sand. Ch.*, 528, 546, 551).

Fourth. The trustees are both beneficiaries under the will, and therefore cannot be trustees (*Costar* agt. *Lorillard*, 14 *Wend.*, 265, 322, 323; 3 *R. S.*, p. 21, § 79).

Fifth. No particular form of words or mode of expression is requisite to create a trust (*Fisher* agt. *Fields*, 10 *John.*, 494, 497; 1 *Redfield on Laws of Wills*, 174-176 [3 ed.], and cases cited).

Sixth. The half-blood take by descent equally with the whole blood (3 *R. S.*, p. 42, § 15 [5 ed.]).

W. W. McFARLAND, *counsel for executors, defendants*, stated: The first and obvious observation upon this hearing

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is that the relief prayed for, by way of injunction and receivership, cannot be granted without clear violation of the established rule that the merits of the cause cannot be tried upon a mere motion, and that the granting of the relief prayed for must be based upon a pre-judgment of the very merits of the action, anticipating final hearing and a disposition of the merits in advance upon a preliminary motion based upon affidavits. This, of itself, is a conclusive reason why the injunction should be dissolved and the application for a receiver denied.

Second. The proposition upon which the action is based is clearly erroneous. The objections urged to the will are these: 1st. That it is void for uncertainty; 2d. Because of an unlawful suspension of the power of alienation; 3d. Because there is an unauthorized provision for accumulation; and, 4th. Because certain of the beneficiaries are aliens.

Third. Before considering these several objections a general view of the will was taken to endeavor to ascertain the general and controlling intent of the testator touching the disposition of his estate. He intends that it shall all be converted into money, and, as money, divided in the prescribed proportion between certain designated persons, who may be regarded, therefore, as the primary objects of his bounty. The primary legatees are his widow and his two brothers, to whom his residuary estate is given; the widow taking one-half and the brothers each one-fourth. Out of this, however, is to be paid a legacy to each of three sisters, one aunt and two children of Dr. Gano, one of his executors. He has expressed a desire that the final distribution and division of his estate between these different legatees should be made *at the end of six years*; and not wishing to leave them unprovided for, in the mean time he has directed that certain advances should be made to them, in the way of annuities, until they come into the actual possession of the principal sum bequeathed to each. It is apparent, therefore, that the principal and controlling intention of the testator would, as the rules of law and the express statutes of the state require,

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be carried into execution if the executors were held to take merely a power in trust for the purpose of sale and distribution to be made, regardless of the restriction as to time and as soon as the same could have been accomplished, provided there had been no suggestion as to the time to be occupied in the performance of this duty, and no provision intermediate made for the objects of his bounty. But the main and cardinal question in the premises is this, namely, what is the nature and quality of the estate taken by the trustees and the several beneficiaries?

Fourth. It is submitted, in the first place, that this is a will of personal property, pure and simple. It is to be dealt with as *a sum in money and nothing else* (2 *Story Eq. Jur.*, § 64, §§ 790, 1212, 1214; *Manice* agt. *Manice*, 43 *N. Y.*, 372; *Kane* agt. *Gott*, 24 *Wend.*, 658, 660; *Everett* agt. *Everett*, 29 *N. Y.*, 40; *Van Vechten* agt. *Van Vechten*, 8 *Paige*, 103, 128; *Bunce* agt. *Vandergrift*, 8 *Paige*, 37; *Craig* agt. *Leslie*, 3 *Wheaton*, 577, 578; *Fletcher* agt. *Ashburner*, 1 *Bro. Ch. Ca.*, 437; 1 *White & Tudor Leading Cases in Equity*, notes; *Phelps* agt. *Pond*, 23 *N. Y.*, 69).

Fifth. The fact that the testator has expressed a desire that that part of his property consisting of real estate should not be converted into money until after the expiration of six years must be manifest, upon a moment's reflection, that it can have no effect upon the general construction of the will, and does not render this clause of it void and defeat the main and general intent of the testator. In reference to well settled principles by which courts are guided in the interpretation of last wills and testaments, see *Darling* agt. *Rogers* (22 *Wend.*, 488); *Hobart's Reports*, 277; *Oxley* agt. *Lane* (35 *N. Y.*, 349); *Harrison* agt. *Harrison* (36 *N. Y.*, 547); *Schettler* agt. *Smith* (41 *N. Y.*, 341).

Sixth. By the fifth clause of the will, which gives rise to the present action, in substance, he gives the residuum of his estate to his executors to convert it into money and distribute the money; one-half to his wife and the other half equally

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between his brothers, Thomas and James. This residuum, it is true, is charged with what may be regarded as certain temporary legacies and certain ultimate legacies, the recipients of both being the same persons. There is no future or expectant estate created; the executors are not to distribute or convey upon the happening of some future contingency or uncertain event. There is no estate created in either of the beneficiaries, subsequent to the testator's decease, but that which he has given to the trustees for their benefit is simply to be distributed or divided. The executors do not convey; they simply distribute and divide the money which has been given to them to distribute and divide. There is, therefore, a vested interest in these several beneficiaries from the instant of the testator's decease; the executors are charged with the mere duty of administration, distribution and division of the testator's bounty, and they are given either an estate or power, and it matters not which, precisely adequate to that end, no more and no less.

The statute, so far as it relates to personal estate, is a distinct title, and professes to treat of accumulations and expectant estates only (24 *Wend.*, 662, 663). And it makes every limitation of a future interest, that would have the effect to suspend the absolute ownership for a period longer than is described, void (*Emmons* agt. *Cairns*, 3 *Barb.*, 242; *Everett* agt. *Everett*, 29 *N. Y.*; *Kane* agt. *Gott*, 24 *Wend.*). It has no application to this case, for this case concerns a present and vested interest, and not a future and contingent interest (*Manice* agt. *Manice*, 43 *N. Y.*, 368, 369; *Law Reports*, 2 *Eq. Cases*). On the point that death may occur to legatees before actual receipt of the property, cited *Hutchin* agt. *Mannington* (1 *Vesey*, 366); *Manice* agt. *Manice*; *Traver* agt. *Schell* (28 *N. Y.*, 89); *Everett* agt. *Everett* (29 *N. Y.*, 39, 78); 24 *Wend.*, 662, 666.

Seventh. Should the direction to the executors not to convert the real estate into personalty for the period of six years be held to be void, it is none the less decisive in favor of the

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validity of the will (*Oxley* agt. *Lane*, 35 *N. Y.*, 346; *Irvine* agt. *De Kay*, 9 *Paige*, 530; 24 *Wend.*, 662; *Darling* agt. *Rogers*, 22 *Wend.*, 488; 41 *N. Y.*, 341; 36 *N. Y.*, 547; 35 *N. Y.*, 394).

Eighth. There is nothing in the point that the will is void as containing a provision for undue accumulation (*Dodge*, *Exr.*, agt. *Pond*, 23 *N. Y.*, 69; *Rupart Estate*, 1 *Tucker*, 480).

Ninth. An injunction cannot issue, because the right upon which it is based is not only doubtful but there is no proof of it at all (*White* agt. *Brownell*, 3 *Abb. N. S.*, 318; 4 *id.*, 162; *Pidgeon* agt. *Oatman*, 3 *Rob.*, 706; *Mott* agt. *Connolly*, 50 *Barb.*, 516; *Hartt* agt. *Harvey*, 10 *Abb.*, 321; *Durnee* agt. *Odell*, 13 *id.*, 264; *Goulding* agt. *Bain*, 4 *Sand.*, 716; 1 *Code Rep.* [*N. S.*], 207).

And because the affidavits in support of the title and injunction are not, in respect to any single fact, on knowledge, but every allegation is on hearsay, information and belief (*Ramsey* agt. *Erie Ry. Co.*, 38 *How.*, 193; *Heckel* agt. *Mayor, &c., of N. Y.*, 28 *How.*, 211; *Bostwick* agt. *Elton*, 25 *id.*, 362; *Levy* agt. *Ely*, 15 *id.*, 395; *Roger* agt. *Wagstaff*, 11 *id.*, 562; *Woodruff* agt. *Fisher*, 17 *Barb.*, 224; *Penfield* agt. *White*, 8 *How.*, 87; *Minor* agt. *Terry*, 1 *Code R.* [*N. S.*], 384; *S. C.*, 6 *How.*, 208; *Smith* agt. *Reno*, *id.*, 124; *Smith* agt. *Austin*, *id.*, 405; *Jones* agt. *Atterbury*, *id.*, 87; *Schoonmaker* agt. *Ref. Dutch Church*, 5 *How.*, 265; *Krom* agt. *Hogan*, 4 *id.*, 225; *Roome* agt. *Webb*, 3 *How.*, 327; *Benson* agt. *Fash*, 1 *Code R.*, 50).

A receiver should not be appointed for the same reason, among others, that an injunction should not be granted, both resting upon the same footing (*Blendheim* agt. *Moore*, 11 *Maryland*, 364; *Voskell* agt. *Hynson*, 26 *id.*, 83; *State* agt. *The Northern Central R. R. Co.*, 18 *id.*, 193; *Knight* agt. *Barr*, 19 *id.*, 134; *Furlong* agt. *Edwards*, 3 *id.*, 99; *Thompson* agt. *Deffenderfer*, 1 *Maryl. Ch. Decis.*, 489; *Tomlinson* agt. *Ward*, 3 *Conn.*, 391; *Orphan Asylum* agt. *McCartee Hopkins*, 429; *Mays* agt. *Rose*, 1 *Freeman's Ch.*, 703; *Ladd*

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agt. *Harvey*, 1 *Foster*, 514; *Maynard* agt. *Baily*, 2 *Nevada*, 313; *Jones* agt. *Dougherty*, 10 *Georgia*, 281; *Crawford* agt. *Ross*, 39 *Georgia*, 44).

The plaintiff's title must be clear, and there must be fraud or very special circumstances before a receiver will be appointed of rents and profits of real estate (*Chicago, &c.*, agt. *U. S. Co.*, 57 *Pa.*, 83; *Cheever* agt. *Rutland, &c.*, 39 *Vt.*, 653; *Baker* agt. *Baker*, 32 *Ill.*, 79; *Haight* agt. *Burr*, 19 *Md.*, 130; *Hamilton* agt. *Accessory Trans. Co.*, 3 *Abb.*, 255; *Willies* agt. *Corlies*, 2 *Edw. Ch. R.*, 381; see *Congdon* agt. *Lee*, 3 *id.*, 304; *Parker* agt. *Moore, id.*, 234; *Carius* agt. *Chabert, id.*, 312; *Huerstel* agt. *Lorrillard*, 7 *Rob.*, 251; *Rogers* agt. *Marshall*, 38 *How.*, 43; see *Ireland* agt. *Nichols*, 37 *How.*, 222; *S. C.*, 7 *Rob.*, 476, and note to sec. 455; *Thompson* agt. *Sherrard*, 22 *How.*, 155; 35 *Barb.*, 593; *People* agt. *Mayor, &c.*, *N. Y.*, 10 *Abb.*, 111; *Greenville* agt. *Fleming*, 2 *J. & L.*, 335 [*Irish Equity*]; cited *Kerr on Receivers*, page 7; *Bates* agt. *Brothers*, 2 *Equity*, 327; *Anonymous*, 12 *Vesey*, 4; *Howard* agt. *Appera*, 1 *Mad.*, 142; *Hawthornthwaite* agt. *Russell*, 2 *Abb.*, 126; *Kerr on Receivers*, pages 13, 17, 19; *Vrowell* agt. *Reed*, 1 *Hare*, 434; *Middleton* agt. *Dodswell*, 13 *Vesey*, 268; *Smith* agt. *Smith*, 2 *Y. & C.*, 361; *Witworth* agt. *Whyden*, 2 *Mac. & G.*, 52; *Pritchard* agt. *Fleetwood*, 1 *Mer.*, 54; *Prebble* agt. *Boghurst*, 1 *Liv.*, 313; *Curling* agt. *Lord Townshend*, 19 *Ves.*, 633; *Palmer* agt. *Vaughn*, 3 *L. W.*, 173; *Talbott* agt. *Hope Scott*, 4 *K. & J.*, 141).

INGRAHAM, *P. J.*—This action is brought for the partition of the real estate of the late John H. McCunn. It is founded on the supposed invalidity of certain trusts in the will, which are claimed to be void or contrary to the provisions of the statute relating to the suspension of the power of alienation.

It is by no means clear that the clause in the will referred to is void. Certainly, the provision for the wife, if by

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itself, would not be ; and as that embraces half the estate, that should be preserved if it could be done consistently with the decisions of the courts on this subject, even if the gifts to the brothers are objectionable.

Nor is it any more clear that the directions as to the sale of the property, after six years, is such a limitation of the power of alienation as to render the whole trust void. Such a provision may be valid as a power of sale merely, and would not destroy the whole intent of the testator in disposing of the bulk of his estate ; but I do not deem it necessary on this motion to decide the questions which have been so ably argued as to the validity of these trusts. There are other considerations which must control in the decision of this motion.

In actions for the partition of property, the right of the plaintiff to be an owner should be clear to warrant the court to take the custody of the property out of the possession of those having an apparently valid title. The executors and trustees are vested with that right under the will, while the claim of the plaintiff is doubtful and uncertain.

So far as relates to the personal estate, the present action has no connection therewith, and there can be no order made in relation thereto.

If the trustees appointed by the will are incompetent or improvident, the supreme court, on a proper application, has power to remove them and appoint others to carry out the trust. No such relief, however, could be given in this action, while the prayer of this application, if granted, would virtually have that effect. On a proper application to the surrogate, also, the executors may from time to time be compelled to account, and when proper proceedings are taken in this court, an order may be made requiring the proceeds of the estate from time to time to be deposited in some suitable trust company, after making provision to pay the claims against the estate, which seem to be constantly accruing.

With these general remarks as to the propriety of granting

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such a motion in such an action, I will examine briefly the affidavits on which this motion is founded.

They are in a great part merely on information and belief as to the conduct of the executors, and the mode of living and family expenses of one of them. Some statements are made apparently on personal knowledge.

In either case, however, the allegations made on the part of the plaintiff, material hereto, are fully and unequivocally denied on the part of the defendants, and the weight of testimony is quite as strong on the one side as the other. There is no propriety in granting the motion on such a state of testimony, nor in trying such a question in this action on conflicting affidavits.

There might, perhaps, be some necessity for it if no other relief existed; but while that may be obtained in various ways, so as to protect the estate from being wasted, I am satisfied this motion should not be granted.

Motion denied with ten dollars costs.

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SUPREME COURT.

SAMUEL P. DINSMORE agt. **THE ATLANTIC AND PACIFIC RAILROAD COMPANY** and others.

This action was brought to restrain the Atlantic and Pacific Railroad Company, a corporation chartered by congress in July, 1866, from paying the rents reserved in a lease made to it by the South Pacific Railroad Company of Missouri, a corporation chartered by the legislature of Missouri. The rent being payable for the use of the railroad constructed and operated by the lessor, and five other railroads previously leased and demised to the South Pacific Railroad Company of Missouri.

The Atlantic and Pacific Railroad Company was empowered by its charter to construct a line of railroad from the town of Springfield, in the state of Missouri, to the western boundary line of said state, and thence by a designated route to the Pacific ocean.

The South Pacific Railroad Company of Missouri was authorized to build and extend its road from St. Louis, westerly through Jefferson City, Springfield and Neosho, to the westerly bounds of the state.

The charter of the Atlantic and Pacific Railroad Company, among other things, provided that if the route described should be found on the line of any other railroad route, to aid in the construction of which, lands had been previously granted by the United States, as far as the routes were upon the same general line, the amount of land granted to the Atlantic and Pacific Railroad Company should be deducted from the grant made by that act.

And in such case it was provided that the railroad company receiving the previous grant of land, could assign its interest to the Atlantic and Pacific Railroad Company, or consolidate, confederate or associate with such company, upon the terms contained in the first and seventeenth sections of the act.

The South Pacific Railroad Company of Missouri, having received a prior grant of land from the United States, and passing through Springfield and Neosho, was within the description of the one from which the Atlantic and Pacific Railroad Company was empowered to purchase the interest of, or consolidate with.

But the Atlantic and Pacific Railroad Company took a lease of the South Pacific Railroad Company of Missouri, and in addition to the rights

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and interest of the latter company, including the privilege of extending the line to St. Louis, took also that part of the road proceeding westward from Franklin, through Jefferson City, together with leases of the five other railroads mentioned, in no way incidental to the interest which could lawfully be made the subject of the purchase. And the rental agreed to be paid consisted of an entire sum, including those lines as well as that between Franklin and St. Louis.

Held, That as such powers, to take these leases, were neither designed nor given to defendant's corporation, the leases of the road from Franklin through Jefferson City westerly, as well as the assignments of the leases of the other five roads, would seem to be void for want of authority in the Atlantic and Pacific Railroad Company to receive them.

And that would result in avoiding the lease from Franklin to St. Louis, as the rent to be paid for all consists of an entire amount incapable of apportionment, and this would constitute a good reason for enjoining the payment altogether.

But that would require the lease and assignments to be altogether annulled, which would result in defeating the entire claim the South Pacific Railroad Company of Missouri as well as the other railroad companies, whose leases have been assigned, may make for the payment of the rent agreed to be paid. And that cannot lawfully be done in this action, because they have not been made *parties* to it.

The defendant, the Atlantic and Pacific Railroad Company, has a direct interest in requiring the presence of the South Pacific Railroad Company of Missouri; for it should not be enjoined from paying the rent reserved, without, at the same time, having its covenant to pay declared void; and that cannot be done in the present state of the case.

The rent which has accrued has already been paid, and before the next installment matures, the plaintiff will have abundant opportunity to bring his action in proper form, and before a tribunal having competent jurisdiction over all the parties to the controversy, when entire justice can be administered. Therefore, no necessity exists for continuing the present injunction, until such an action can be commenced.

New York Special Term, August, 1873.

MOTION to continue injunction.

JULIAN E. DAVIES & WM. C. BARRETT, *for plaintiff*.

COLES MORRIS, *for defendants*, in an elaborate and able general brief stated, on the second point, that the court could not determine the validity of the lease without directly affecting the rights of the South Pacific Railroad Company of

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Missouri, not a party to the action, as it would be contrary to all rules which govern courts of equity, and against the principles of natural justice, citing *Story's Eq. Pl.*, § 77; *Mallon agt. Hinde*, 12 *Wheat.*, *p* ; *Russell agt. Clark's Exrs.*, 7 *Cranch*, 96; *Gray agt. Schenck*, 4 *Comst. R.*, *p.* 460; *Spann agt. Scoville et al.*, 2 *Cush.*, (*Mass.*) *R.*, 578; *Hallett agt. Hallett*, 2 *Paige Ch. R.*, 19; *Howell agt. Chicago and N. W. R. R. Co.*, 51 *Barb.*, 379; *Code*, § 122; *Sturtevant agt. Brewer*, 4 *Bosw.*, 628; *Monroe agt. Galveston, etc., R. R. Co.*, 19 *Abb.*, 90.

On the sixth point, the power to grant preliminary injunctions ought to be exercised with extreme caution and applied only in very clear cases, citing 2 *Story's Eq. Pl.*, § 959; *Woodward agt. Harris*, 2 *Barb. Ch.*, 443; *Brown agt. Newall*, 2 *Mylne & Craig*, 570; *Ramsey agt. Erie R. R. Co.*, 7 *Abb. (N. S.)*, *p.* 187.

DANIELS, J.—The substantial object of this action is to restrain the Atlantic and Pacific Railroad Company from paying the rents reserved in a lease made to it by the Pacific Railroad Company of Missouri. The rent is payable for the use of the railroad constructed and operated by the lessor, and for the control and use of five other railroads previously leased and demised to the South Pacific Railroad Company of Missouri.

The road of the lessor extended from St. Louis westerly through Jefferson City, and was designed to be constructed to the westerly bounds of the state.

The roads leased to that company were the Missouri River railroad, the Leavenworth, Atchison, and North-western railroad, the Booneville extension of the Osage Valley and Southern Kansas railroad, the Lexington and St. Louis railroad, and the St. Louis, Lawrence, and Denver railroad. And these leases were assigned to the Atlantic and Pacific Railroad Company. They, as well as that portion of the Pacific railroad of Missouri, westerly of Franklin, were not

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in the route over which the Atlantic and Pacific railroad by its charter was to construct its road, and formed no part of the connections which that act in terms authorized it to make. It is claimed, however, that the contract, by which all these roads in substance leased by the Atlantic and Pacific Railroad Company, was justified by the circumstance that it could not obtain the road from Franklin to St. Louis without taking the others along with it.

In order to determine whether this position can be maintained it will be necessary to ascertain the authority which the act of incorporation conferred in this respect upon the Atlantic and Pacific Railroad Company.

That act was enacted by congress and approved on the 27th day of July, 1866. And it empowered the corporation it created to construct, maintain and enjoy a continuous line of railroad; beginning at or near the town of Springfield in the state of Missouri, thence to the western boundary line of said state; and thence by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque on the river Del Norte; and thence by the way of the Agua Frio, or other suitable pass, to the head waters of the Colorado Chiquito; and thence by the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; and thence by the most practical and eligible route to the Pacific."

And the company was vested with all the powers, privileges and immunities necessary to carry into effect the purposes of the act as therein set forth. In order to enable it to construct and furnish its road, it was munificently endowed with a large and liberal grant of the public lands, amounting in extent to about 55,000,000 of acres, and for its road-bed was given a strip 200 feet in width wherever it crossed the lands of the United States.

But in order to avoid a double donation of public pro-

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perty to attain the same end, it was provided that if the route described should be found on the line of any other railroad route, to aid in the construction of which lands had been previously granted by the United States "as far as the routes are upon the same general line," the amount of land granted by its charter to the Atlantic and Pacific Railroad Company should be deducted from the grant made by that act. And in that case it was provided that the railroad company receiving the previous grant of land, could assign its interest to the Atlantic and Pacific Railroad Company, or consolidate, confederate, or associate with such company upon the terms contained in the first and seventeenth sections of the act.

These sections in general terms confined the interests to be acquired to the promotion of the purpose disclosed by the act without enlarging the authority otherwise conferred.

Before the enactment of this charter the state of Missouri incorporated a railroad company to construct a railroad from Franklin through Springfield and Neosho to the western boundary of the state.

The Southern Pacific Railroad Company had been made the recipient of a donation of the public lands under a previous grant of the United States. Through Springfield and Neosho certainly its railroad route was upon the same general line as that designated for the railroad of the Atlantic and Pacific Railroad Company. It was therefore within the provision of the charter declaring that in such an event a deduction should be made from the amount of the public lands otherwise provided for that company. And for that reason it was empowered to take an assignment of the interest of the Southwest Pacific Railroad Company, or consolidate, confederate or associate with it.

But before either was done the company owning the other route forfeited its rights to the state of Missouri, and that state, by its legislative authority, conferred them upon a new company in March, 1868, called the South Pacific Railroad Company. This new company, according to the affidavits produced,

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was incorporated to construct a railroad from St. Louis to the western boundary of the state, passing through or near the towns of Springfield and Neosho. From that time the new company was within the description of the one from which the Atlantic and Pacific Railroad Company was empowered to purchase the interest of or consolidate with.

For it then became the owner of the railroad route and of the grant of land made to the preceding company. And it was on the existence of those circumstances alone that the power to purchase was made to depend. It was not restricted to a purchase from the company formed before the charter of the Atlantic and Pacific Railroad Company was enacted. But liberty was given to make the purchase of the company receiving the previous grant of land and also owning the other route. Neither was it necessary that the other railroad should have been constructed, for the right to purchase was secured when it was found that both roads were upon the same line, provided the other company had received land granted for railroad purposes by the United States. Under the act of congress the purchase could lawfully be made of any company receiving such grant of land, and owning what may have been properly regarded as a rival route, and for that reason not to be built and fostered by the public bounty.

When this right to purchase was found to exist under the circumstances mentioned in the act of congress, it was not restricted to so much only of the other railroad route of the road authorized by that act. That would ordinarily be regarded as an end that could not probably be accomplished, for a company authorized to construct a line through the entire state could not be expected voluntarily to relinquish so much of its road as proved a rival to another route and retain and operate the residue. Such a surrender might prove entirely destructive to its prosperity and success. The act of congress was not confined by so narrow a view of what it might prove essential to accomplish, as that when the right to purchase arose from the existence of the circumstances

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on which it was expressly made dependent, it entitled the Atlantic and Pacific Railroad Company to take an assignment of the interest of the company owning the other route, not a partial interest simply, but its entire interest; for the term interest, used in the act, when unrestrained, as it is in this case, includes all the interest owned in its own right by the other corporation.

This comprehended its route, road, property and franchises. Together they constituted its interest, and the act of congress permitted that to be assigned to the company it provided for organizing. A part of that interest was the corporate right to extend its road to St. Louis; and that in the sale made by the South Pacific Railroad Company to the Atlantic and Pacific Railroad Company was transferred to the latter company.

The object of the act of congress seems to have been to provide for the company it formed substantially assuming all the corporate rights of the corporation owning the other route, provided it had received a grant of public lands. And by doing that it secured it lawful authority to construct and operate the road, the company whose rights it acquired was authorized to construct and maintain. That was necessarily so, since it clearly formed part of the interest of the other company.

The acquisition of this interest was a part of the purpose for which the Atlantic and Pacific Railroad Company was created; and to promote that purpose, in order to reach its own lawful terminus, it had the power to accept from the legislature of the state of Missouri the franchise to lease, unite or consolidate with any other company owning a road continuous with and including any portion of that which it could lawfully make and operate. That was secured by the seventeenth section of its charter. That allowed the company to accept any donation, power, franchise, aid or assistance granted by any state for the purpose provided for by it. And as the assignments made by the South Pacific Railroad Company

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transferred the right to it to extend its line to St. Louis, it could obviously do so by any practicable method supplied by the legislature of the state.

And that body provided that any company chartered by the state or act of congress, having the whole or part of its line within that state, could lease or purchase the line of any other road connected or continuous with its own line.

These provisions were broad enough to permit the Atlantic and Pacific Railroad Company to receive a lease of that part of the Pacific Railroad Company of Missouri extending from Franklin to St. Louis; for that did not exceed the bounds which, under the interest assigned to it by the South Pacific Railroad Company, it could lawfully extend the road.

And having the right to build and maintain a road to that point, the same purpose was, in substance, secured by the legislative act providing for the acceptance of a lease from the company which already had the road in existence.

It was an additional franchise for the accomplishment of one of the purposes provided for by the act of congress, and for that reason it could be lawfully received from the state, as the charter provided for such an addition to the powers of the corporation it created.

And if nothing more than that had been done the defendant's stockholders would have no just grounds of complaint, and no case would exist for an injunction.

The stockholders of this as well as of other corporations have the right to insist that neither its revenues nor its property shall be diverted from the lawful purpose of its organization; and the public interests require the observance of the same rule.

But the purchase which was made was not confined within those limits; for, in addition to the rights and interests of that company, including the privilege of extending the line to St. Louis, a lease of the Pacific railroad of Missouri was taken for that part of the road proceeding westward from Franklin through Jefferson City, together with leases of the

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five other railroads previously mentioned, in no way, even incidental, to the interest which could lawfully be made the subject of the purchase; and the rental agreed to be paid consisted of an entire sum, including those lines as well as that between Franklin and St. Louis.

The reason given for taking those lines is the fact that the road from Franklin to St. Louis could not be leased without them.

But as the Atlantic and Pacific Railroad Company was not obliged to lease even that part of the route by anything contained in its own charter, or that of the South Pacific Railroad Company, whose interest it purchased, that inability formed no legal excuse which would justify the taking of the other leases.

If it could not obtain the lease it had the power to take, without the others, then all should have been refused, and a new road constructed, by itself, under the charter of the South Pacific Railroad Company, from Franklin to St. Louis.

It has always been the policy of the legislative authority of the country to confer upon corporations created or authorized by it, just such powers as it was deemed proper they should have.

And the courts have confined them within the reasonable construction of such powers.

Where they have proved not conveniently flexible, that has usually supplied a reason, inducing further legislation.

But not one justifying a transgression of their lawful authority.

There is nothing in the defendant's charter allowing it to take leases of the railroads, in order to induce the leasing to it of that part of the road between Franklin and St. Louis. If that could be done, with the same propriety it might, under similar exactions, have taken leases of every railroad in the west.

The authority which can in this instance be invoked in

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support of what has been attempted, would include all that has been referred to.

It is clear that no such powers could have been designed for a corporation, whose leading and controlling purpose was the construction of a railroad from the state of Missouri to the Pacific ocean.

And as such powers were neither designed nor given, the leases of the road from Franklin through Jefferson City, westerly, as well as the assignments of the leases of the other five roads, would seem to be void for want of authority in the Atlantic and Pacific Railroad Company to receive them.

And that would result in avoiding the lease from Franklin to St. Louis, because the rent to be paid for all consists of an entire amount incapable of apportionment. There is no way afforded by the papers in which a separation can be made of that which was authorized, from that which the company had no right to receive, and no power to bind itself to pay for. This would constitute a good reason for enjoining the payment altogether.

But that would require the lease and the assignments to be altogether annulled, which would result in defeating the entire claim the Pacific Railroad Company of Missouri, as well as the other railroad companies whose leases have been assigned, may make for the payment of the rent agreed to be paid. And that cannot lawfully be done in this action because they have not been made parties to it. The authorities relied upon as excusing the omission of the Pacific Railroad Company of Missouri as a party, because it is a foreign corporation having neither property nor a place of business within this state, do not sanction that position.

In the cases cited one or more persons were made parties representing interests participated in by themselves and those who were beyond the jurisdiction of the court.

Here no person or body is brought before the court whose interest it is to sustain the validity of this lease and the assignments. The corporations entitled to insist upon the

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validity of the covenant to pay the rent reserved are neither directly nor indirectly before the court.

And for that reason, no matter how clear the case may now appear against them, the court has no right to determine their rights.

They may be able to present reasons in their own behalf which will give the transactions involved an entirely different complexion.

In their absence the court cannot undertake to adjudge the case against them (*Russell* agt. *Clark's Exrs.*, 7 *Cranch*, 69, 98; *Mallan* agt. *Hinde*, 12 *Wheaton*, 194).

In this case it was held "that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court" (*Id.*, 198, 199; *Hallett* agt. *Hallett*, 3 *Paige*, 15).

In this case the chancellor, after considering the exceptions to the general rule requiring all persons interested in the controversy to be made parties to the action, adds that the exceptions do "not extend to those cases where the rights of persons not before the court are so inseparably connected with the claims of the parties litigant that no decree can be made without materially affecting the rights of the former" (*Id.*, 19).

The same ruling was sustained in *Gray* agt. *Schenck* (4 *Com.*, 460).

And it seems needless to add that the present case is clearly within the principle maintained.

The defendant, the Atlantic and Pacific Railroad Company, has a direct interest in requiring the presence of the Pacific Railroad Company of Missouri.

For it should not be enjoined from paying the rent reserved, without at the same time having its covenant to pay declared void. And that cannot be done in the present state of the case. The rent which has accrued has all been paid, and before the next installment matures, the plaintiff will have an abundant opportunity to bring his action in proper

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form, and before a tribunal having complete jurisdiction over all the parties to the controversy, when entire justice can be administered.

For that reason no necessity exists for continuing the present injunction until such an action can be commenced.

The motion to continue it must be denied, with ten dollars

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SUPREME COURT.

LAURA A. SANFORD and others agt. LAVINIA S. WHITE and others.

The Code does not provide for the service of process upon unknown owners in *partition* cases. The 135th section, providing for publication, so far as it applies to unknown parties, is confined to actions for the foreclosure of mortgages.

The Revised Statutes, as amended, will apply, and are continued as applicable to partition cases by the 448th section of the Code.

The Revised Statutes (*vol. 3, p. 605*) and the act of 1842 (*p. 363*) prescribe the requisite notice to be published with a description of the premises to be partitioned; and without such a description the advertisement addressed to unknown owners is an idle ceremony, and the court will not obtain jurisdiction over them.

First Department, New York General Term, Nov., 1873.

Before INGRAHAM, P. J., BRADY and FANCHER, JJ.

IN this case the property was sold in partition. The purchaser refused to take the title on account of defects in the proceedings, and a motion was made at the special term to compel the purchaser to complete the purchase. This was denied, and the plaintiffs appealed.

INGRAHAM, P. J.—The ground of objection is that no jurisdiction was ever acquired over those of the heirs of Kitchell Bishop and Jesse Bishop whose names were unknown. These persons were described in the complaint as “the legal representatives of Kitchell Bishop and Jesse Bishop, deceased, whose names are unknown to the plaintiffs; and there was also an averment that their names and places of residence were wholly unknown to the plaintiffs, and they cannot ascertain the same.”

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These proceedings were taken under the Code by an order directing a publication for three months in the state paper and in a paper published in New York. No other order of publication was made.

The provision of the 135th section of the Code, which is the only one providing for publication, does not aid this proceeding. That section, so far as it applies to unknown parties, is confined to actions for the foreclosure of mortgages, and makes no provision suitable to partition cases, nor to any other action where the parties are unknown. The 175th section, which provides for using a fictitious name where the real name is unknown, was not followed in this case; and if it had been, it would not have removed the difficulty. I think it is clear that the Code does not provide for such a case as the present one.

In the absence of any other legislation in the Code, the Revised Statutes, as amended, will apply, and are continued as applicable to partition cases by the 448th section of the Code.

The Revised Statutes, third volume, page 605, provided as follows: "If any party having an interest in the property is unknown, the service may be by publication of the petition for three months, and the fifteenth section directs the notice to be addressed to those who are unknown, having or claiming any interest in the premises. The act of 1831, page 362, altered the publication by requiring a description of the premises to be published, and notifying all persons interested therein to appear.

The act of 1842, page 363, altered the time of publication, but did not change the character of the notice. That remains as before the passage of the act.

It is not pretended that any such notice as required by either of these statutes was published, or any description of the premises to be partitioned. The intent of the statutes was to describe the property, and thereby give notice to any who might have an interest. Without such a description the

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advertisement addressed to unknown owners would be an idle ceremony (*see Hyatt agt. Pugsley, 23 Barb., 303*).

There was no jurisdiction obtained over the persons who were unknown, and the purchaser should be relieved from his purchase.

The order should be affirmed.

BRADY and FANCHER, JJ., concurred.

Kain agt. Dickel.

N. Y. SUPERIOR COURT.

ABRAHAM B. KAIN agt. CHRISTIAN F. DICKEL.

A *demurer* cannot be stricken out as sham.

New York Superior Court, Special Term, October, 1873.

VAN VORST, *J.*—The defendant has interposed a demurrer to the complaint. The ground of demurrer is that the complaint, as appears from the face thereof, does not state facts sufficient to constitute a cause of action.

The plaintiff now moves to strike out the demurrer as sham.

The plaintiff has mistaken his remedy.

Section 152 of the Code provides that sham and irrelevant defenses may be stricken out on motion.

A demurrer of this character is not interposed by way of defense. It concedes the allegations of the complaint, and substantially claims that they require no defense; that, notwithstanding their truthfulness, they give the plaintiff no cause of action.

Under the Code, defenses are to be set up by answer (§ 149, *subdivision 2*; § 150, *latter part of subdivision 2*), and if a defense, so set up, be sham, it may be stricken out under section 152.

A defense applies to any facts which defeat the action wholly or partially (*Stewart* agt. *Travis*, 10 *How.*, 148; *Houghton* agt. *Townsend*, 8 *How.*, 441; *Foland* agt. *Johnson*, 16 *Abb.*, 235).

If there is no just ground for this demurrer, it may be

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treated as frivolous, and the plaintiff's remedy is under section 247 of the Code.

He may move, on a notice of five days, for judgment thereon, and on such motion the sufficiency of the pleading may be determined.

Motion denied.

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SUPREME COURT.

ELIZA CRAWFORD agt. HENRY H. WATERS, receiver, &c., of
JAMES K. SPRATT.

In order to entitle a lessee, mortgagee or judgment creditor to *redeem* after the landlord has recovered possession of the demised premises under a warrant of dispossession in summary proceedings under the statute, a payment must be made to the landlord equal to all the rent in arrear at that time, and all costs and charges incurred by the landlord. Short of this no redemption of the forfeited possession can be effected.

The statute does not provide that such required payment shall be reduced by so much as the landlord may have received for rents or other income or benefit, during the period of the landlord's possession, subsequent to the execution of the warrant.

If the landlord can be called upon to account for the rents and income received from the premises during such *interregnum*, it could only be done after a redemption under the statute has been effected and the lessee is restored to the benefits of the lease of which he was deprived by the dispossession proceedings.

But any act done by the landlord, knowing of a cause of forfeiture by his tenant, affirming the existence of the lease and recognizing the lessee to be his tenant is a waiver of such forfeiture; and this result follows without reference to the amount of rent received.

If any part of the rent be received by the landlord which accrued subsequent to the breach, he again consents to and establishes the tenancy, which it was competent for him to have avoided. But after the landlord has avoided the lease by a judgment the effect may not be to restore the lease, yet it is a parol acknowledgment of the tenancy.

Where the landlord received and retained a certain sum of money paid on behalf of the tenant to redeem under dispossessory proceedings, which sum was insufficient for that purpose, and it being doubtful whether some or all of such money was not collected as rent from the premises subsequent to the dispossessory proceedings by the defaulting tenant, *held*, a proper case for a reference and accounting.

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New York Special Term, November, 1873.

ACTION by plaintiff and for an injunction to restrain defendant from collecting and receiving rents.

FANCHER, J.—The plaintiff, in summary proceedings to recover possession for non-payment of rent, was, on the 27th February, 1871, put in possession of Nos. 28 and 30 West Broadway, in the city of New York, in pursuance of a warrant issued by the justice of the eighth judicial district of said city.

In April following she leased a portion of the premises to John Terhune, who paid rent to the plaintiff until the 1st of September, 1871.

The defendant, Henry H. Waters, having, in proceedings supplementary to execution, been appointed receiver of the property of James K. Spratt, the tenant of the plaintiff, against whom the dispossession proceedings were prosecuted, brought an action in this court in August, 1871, to regain possession of the forfeited premises, claiming the right to be restored to the benefits of the lease made to Spratt.

That action was tried on the 15th February, 1872, at the New York special term, before Hon. DANIEL P. INGRAHAM, presiding justice. The decision in that action was to the effect that the receiver had failed to tender to the lessors, or to the officer who issued the warrant of dispossession, already mentioned, a sufficient sum to cover the rent in arrear, and the costs and charges of the landlords; and had not, therefore, properly redeemed the premises; was not entitled to be let into the possession thereof, and was not entitled to the injunction restraining the collection of the rents, which, at the commencement of the action, he had obtained.

During the existence of the injunction just mentioned, the receiver went to the tenants of the premises, and, asserting his authority to receive the rents, succeeded in collecting from some of the tenants, some part of the rents. He also instituted a summary proceeding as landlord, against said John

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Terhune, as tenant, to recover possession for non-payment of rent; whereupon the plaintiff, claiming to be the rightful landlord of the premises, and entitled, as against Spratt and the receiver, to the possession thereof, commenced this action, by leave of the court, against the receiver, and applied for an injunction to restrain his interference with the tenants and rents of the premises.

The summons is dated on the 24th October, 1871, and the action was probably commenced on or about that day.

Thereafter, on the 27th day of February, 1872, the defendant paid to the justice who issued the above-mentioned warrant of dispossession, \$1,300, "in order to be restored to the said premises, under the lease of the same;" and thereupon he verified and caused to be served, under an order of the court, a supplemental answer, setting forth such payment and alleging that the "sum so paid exceeds all the rent due and in arrear, and the costs legally and properly chargeable against the said tenant, and interest thereon."

This supplemental answer alleges, however, that the whole amount to which the plaintiff was entitled was \$2,337.15 for rent, about five dollars for costs and some interest thereon; and "that she has received in rents and profits from the said premises and from the tenants therein, or is properly chargeable with the receipt of \$1,600, or about that sum, and from the defendant and from the rents aforesaid, through a receiver in this action, the further sum of \$800, and the aforesaid sum of \$1,300, making in the whole aggregate \$3,700 or upwards."

Under the original and supplemental answer, the defendant claims to be entitled to be repaid the said \$1,300, or so much thereof as, on a just accounting, shall be found to belong to him, and to have the complaint dismissed. The supplemental answer alleges that the \$1,300 were paid over by the justice to the plaintiff, and sets up such payment by way of counterclaim, as well as by way of defense, to the plaintiff's cause of action. No reply to the supplemental answer has been served.

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I think there is a fatal difficulty in the supposed defense set forth in the supplemental answer of the defendant, so far as it is intended to allege therein a redemption under the statute.

It is therein stated that the amount to which the plaintiff was entitled at the time of the payment to the justice of the \$1,300, was \$2,337.15 for rent, about five dollars for costs, and some interest.

The payment of \$1,300 could not satisfy this claim of more than \$2,300. The statute (3 *Rev. Stats.*, p. 840, 5 *ed.*) reads as follows:

Section 54. "In case of proceedings under the second subdivision of section twenty-eight, title ten, chapter eight of the third part of the Revised Statutes, if the unexpired term of the lease under which the premises are held exceeds five years at the time of issuing the warrant upon such proceedings, the lessee, his assignees or personal representatives may, at any time within one year after possession of the demised premises shall have been delivered to the landlord, pay or tender to the lessor, his representatives or attorney, or to the officer who issued the warrant, all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlord; and, in such case, the premises shall be restored to the lessee, who shall hold and enjoy the same without any new lease thereof, according to the terms of the original demise; and any mortgagee of the lease, or any part thereof, who shall not be in possession of the demised premises, or any judgment creditor of the lessee who shall, within one year after the execution of such warrant, pay all rent in arrear, all costs and charges as aforesaid, and perform all the agreements which ought to be performed by the first lessee, shall not be affected by such recovery; and such judgment creditor may file a suggestion of such payment upon the record, and may issue execution for the amount of the original judgment and of such payment." (*Laws of 1842, chap. 240, § 1.*)

The requirements of this statute were not complied with by the defendant when he made payment, to the officer who

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issued the warrant, of only \$1,300. The payment should have been equal to all rent in arrear at that time, and all costs and charges incurred by the landlord. No redemption of the forfeited possession could be effected under the section of the statute already quoted, by anything less than the payment of all the rent in arrear and the costs and charges.

The statute does not provide that such required payment shall be reduced by so much as the landlord may have received for rents or other income or benefit, during the period of the landlord's possession, subsequent to the execution of the warrant. If the landlord can be called on to account for the rents and income received from the premises during such *interregnum*, it could only be done after a redemption under the statute has been effected, and the lessee is restored to the benefits of the lease of which he was deprived by the dispossession proceedings.

But it is claimed that equity will relieve a tenant from the forfeiture of a lease in all cases where it has been incurred by the neglect to pay a sum of money, which, with the interest thereon, can be calculated with certainty, so that by the payment of the same the landlord can be fully compensated. This, no doubt, is the rule, in equity, independent of the statute, and it is a rule which has been frequently applied (*Jackson agt. Brownson*, 7 *Johns. R.*, 235; *Nelson agt. Carrington*, 4 *Munf. R.*, 333; *Bracebridge agt. Buckley*, 2 *Price R.*, 200; *Corning agt. Beach*, 26 *How. Pr. R.*, 289).

The latter case went so far as to adjudge that a judgment creditor of the tenant may have an action for relief in equity, after re-entry, for non-payment of rent under an execution in ejectment, and that the leasehold interest be sold for his benefit, provision being made for compensation and indemnity to the landlord. Courts of equity exercised the power of relieving against forfeiture after judgment in ejectment had been executed. Our statute, in such a case (2 *R. S.*, 506, § 331), practically restricted this power, so that it could not be exercised unless the action for relief was brought within six

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months after possession was taken by the landlord under the judgment and execution awarding a re-entry. This, however, is not such a case.

No ejectment was brought nor judgment or execution in ejectment had. The plaintiff took possession under a warrant issued by a magistrate under the provisions of our statutes relative to summary proceedings to recover the possession of land, and the question is, what is the effect of a re-entry under such a warrant?

The statute reads as follows: "§ 43. Whenever a warrant shall be issued as aforesaid by any such magistrate for the removal of any tenant from any demised premises, the contract or agreement for the use of the premises, if any such exists, and the relation of landlord and tenant between the parties, shall be deemed to be canceled and annulled" (3 *R. S.*, 5th ed., p. 838). It was held in *Hinsdale agt. White* (6 *Hill*, 508) that this statutory annulment operated only from the time when the warrant issues, leaving the contract to its full effect previous to that time. It does not follow, therefore, that enforcing a forfeiture in such a manner extinguishes the lease totally, nor does it deprive the landlord of an action for rent due under the lease, which accrued prior to the issuing of the warrant. And if any part of a quarter or term had passed while the tenant was in possession, the rent for which had not become due and payable when the warrant issued, the landlord could maintain an action against the tenant as a trespasser, and recover by way of damages a sum proportionate to the rent for such time (*Id.*, p. 511). So it appears there is not a total obliteration of the lease nor of the relation of the parties as landlord and tenant except for the time subsequent to the issuing of the warrant, and even for such subsequent time there is an opportunity for the lessee, his assigns or representatives, or his judgment creditor, under chapter 240 of the Laws of 1842 (see 3 *R. S.*, 5th ed., p. 841) to redeem the forfeiture and to have the premises restored to the lessee thereof, "who shall hold and enjoy the same without any new lease,

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according to the terms of the original demise," provided payment or tender be made as required by the statute within one year, and it be a case where the unexpired term of the lease exceeds five years from the issuing of the warrant.

Whether the effect of the statute permitting such redemption has any further extent in abridging the power of a court of equity than to limit the time within which the tenant must apply by action for relief from the forfeiture to the period of one year from the issuing of the warrant is a doubtful question. But it does not seem necessary to determine that question in this action.

It appears in this case that the defendant, who as receiver represents the judgment creditors of Spratt, the tenant of the plaintiff, undertook *bona fide* to redeem the demised premises under the statute, but made a mistake as to the amount which it was necessary to pay or tender in order to effect such redemption. The \$1,300 which he paid was too small a sum, and was not equal to the rent in arrear due the plaintiff, as landlord under the lease.

Still, it is alleged, in the supplemental answer, that said \$1,300, paid by the defendant to the magistrate who issued the warrant, was paid over by him to the plaintiff, and "that she received *and has retained and kept the same*."

Now, what is the effect of receiving this money if it was rent which accrued since the re-entry? Did it waive the judgment of forfeiture? It is well settled that "any act done by a landlord, knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture" (1 *William Saunders*, 287; 2 *Platt on Leases*, 471; 1 *Wash. on Real Property*, 454; *Taylor's Land. and Ten.*, § 497; *Ireland agt. Nichols*, 46 *N. Y. Rep.*, 416).

This result follows without reference to the amount of rent received. If any part of the rent be received by the landlord which accrued subsequent to the breach, he again consents to and establishes tenancy, which it was competent for

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him to have avoided. But after the landlord has avoided the lease by a judgment, the effect may not be to restore the lease, yet I think it is a parol acknowledgment of a tenancy.

What could be the intention of the plaintiff in receiving the \$1,300 as rent, except to acknowledge a tenancy? She could not claim the possession of the premises under her re-entry, and receive rent therefor from a tenant or his representative, for the same time. If a tenancy was thereby created, such tenancy, by parol, would, under our statute, expire on the ensuing first day of May.

There is an allegation in the complaint that the defendant received some rents from the sub-tenants for the month of September, subsequent to his appointment; and it is possible that the \$1,300 paid by him were the rents thus received. If that be so, the plaintiff may have thought she was receiving only what was her due under the prior tenancy, and may not have intended a new tenancy, nor to accept anything as from the dispossessed tenant, or any one representing him, for rent accruing subsequent to the warrant in the summary proceedings.

This can only be determined by an accounting, for which purpose there should be a reference. The order of reference should provide for an account to be taken of all sums, and interest, which have accrued and become due to the plaintiff under her lease to Spratt; also of all sums received by her from the tenants, as well as from the defendant; and, on the coming in of the report of the referee, stating the account, such further order or judgment can be made as shall be proper.

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SUPREME COURT.

JOHN J. DETWILLER agt. THE MAYOR, &c., OF THE CITY OF
NEW YORK.

A valid contract may be made by city authorities for the purchase of *fire-works* of over \$250 in amount, for celebration purposes, without advertising for bids therefor.

It is not a valid objection to the payment of such a claim against the city that there is no money in the treasury applicable thereto and appropriated therefor, because:

- 1st. The expenditure was not incurred by any head of a department or any officer of the city government; it was entirely independent of either, and did not, therefore, come within the provisions of section 28 of the charter of 1857;
- 2d. The objection of a want of appropriation is answered by the resolution of the common council, which appropriated for this purpose the sum of \$30,000; and the plaintiff was not bound to inquire further than to see that the appropriation was duly made.

*First Department, New York General Term, June, 1873.
Before INGRAHAM, P. J., BRADY and FANCHER, JJ.*

THIS action was brought to recover for fire-works furnished to the defendants on the 4th July, 1869. There was no specific contract for the price to be paid, but a resolution was passed by the common council and approved by the mayor 16th June, 1869, appointing a special committee to make arrangements to celebrate the anniversary of American Independence, and appropriating \$30,000 to pay the expenses, to be taken from the appropriation for city contingencies. Under this resolution the committee authorized the firm of Lilliendahl & Co. to furnish \$22,000 worth of fire-works for the purpose therein mentioned. The proof shows the delivery of the fire-works and their value to be \$22,000. The

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defense was based upon the statutory prohibitions as to contracts and the expenditures of money without appropriations, which will be noticed more particularly hereafter. They were severally overruled upon the trial, and the jury rendered a verdict for the plaintiff. The defendants appealed.

SIMON STERNE, *for plaintiff.*

D. J. DEAN, *for defendants.*

INGRAHAM, *P. J.*—Under ordinary circumstances the proof on the part of the plaintiff was amply sufficient to establish a good cause of action in favor of the plaintiff, who was the assignee of Lilliendahl & Co. for whatever was shown to be the value of the articles furnished under the authority of the committee.

The defendants moved for a dismissal of the complaint on the following grounds :

1st. That the amount involved exceeded \$250, and should, therefore, have been done by contract after reception of bids therefor.

2d. That there was no money in the treasury applicable to the plaintiff's claim.

These were overruled.

It was also objected that the resolution was not duly published, and that no sufficient appropriation had been made, as required by the charter of 1857 and by the statute of 1866.

As to the first objection, it seems to be sufficient to say that this contract was for articles of a peculiar character, depending entirely on the skill of the manufacturer, and for which a general advertisement for proposals could not well be made. The same principles which sanctioned the contract in the case of the Harlem Gas Company would be applicable here, and would warrant the making of this contract without receiving bids to do the work.

As to the second objection, that there was no money in the treasury applicable to the payment of this claim, in pursuance

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of the act of 1866; in *Quinn* agt. *The Mayor, &c.*, this section was held to be only operative as to the year for which it was passed, and that it did not apply subsequently. This case was affirmed in general term and in the court of appeals.

The next objection is, that the resolution under which these articles were furnished to the city was not advertised, in pursuance of section 7 of the charter of 1857.

That section only applies to resolutions and reports of committees which recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing the citizens of the city. The present resolution is not within the terms used in this section. It does not recommend any specific improvement, nor does it tax or assess the citizens of the city.

That section was intended to apply to proceedings affecting the real estate of the city, such as improving the streets or squares and to similar improvements, which were to be paid for by an appropriation of public money or by assessment upon the property of individuals. It does not apply to an article purchased for the city under a resolution passed by the common council.

The remaining objection is that there was no proof that there was money in the treasury, applicable to the payment of this claim, which had been appropriated therefor.

The words of the twenty-eighth section of the charter of 1857 are: "No expense shall be incurred by any of the departments or officers thereof, whether the object of expenditure shall have been ordered by the common council or not, unless an appropriation shall have been previously made covering such expense."

It is clear that this expenditure was not incurred by any head of a department or any officer of the city. It was incurred by a committee of the two boards under a resolution of the common council. It was entirely independent of any department or of any officer of the city government. As such it does not come within the provisions of the sec-

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tion, nor was anything therein applicable to the claim now in controversy.

The objection that there was no appropriation for this expenditure is answered by the resolution itself, which appropriates the sum of \$30,000 for the purposes contemplated in the resolution. It is true that it directs the same to be taken from that of county contingencies, but I do not think it was the duty of the plaintiff to inquire further than to see if the appropriation was duly made. He was not bound to go further and examine the books to ascertain how much of that appropriation remained unexpended. That reference to the source from which the money was to be obtained was merely directory, and as such did not affect the right of the plaintiff to be paid for the goods furnished.

There was no error on the trial for which the judgment should be reversed.

Judgment affirmed, with costs.

BRADY, J., concurred.

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SUPREME COURT.

WILLIAM A. GILBERT, assignee of the estate and effects of
CYRUS A. FURMAN, a bankrupt, agt. GEORGE CRAWFORD
et al.

This court has jurisdiction of an action brought by an *assignee in bankruptcy*, to recover money and property from the defendants alleged to have been previously conveyed to them by the bankrupt in fraud of the act of bankruptcy, passed by congress, March 2, 1867.

Jefferson Special Term, September 5, 1872.

THE plaintiff alleges his appointment under the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and the execution of an instrument by a register in bankruptcy conveying all of the estate of the bankrupt, the 7th of December, 1871, to the plaintiff.

That prior to the adjudication of bankruptcy, and in contemplation thereof, the bankrupt conveyed certain property to the defendants, and made certain payments to them as creditors, in fraud of the said act and with intent to hinder, delay and defraud the other creditors of the bankrupt, a demand of the defendants by the plaintiff of such property, and a payment of the moneys and a refusal by the defendants, and then the complaint asks for judgment against the defendants for the same, or its value.

The defendants demurred to the complaint, as follows :

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That the court in which such action is brought has no jurisdiction of the subject-matter set forth in the complaint.

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A. J. BROWN and M. H. MERWIN, *for plaintiff.*

ULMAN, LAZZAM & REMMINGTON, and P. C. WILLIAMS,
for defendants.

HARDIN, J.—By the proceedings in bankruptcy, and the execution of the instrument alleged by the register in bankruptcy, the plaintiff took title to all the property and effects, not exempt by law, which belonged to the insolvent at the time of the commencement of the proceedings (*See section 14 of act of congress*).

The fourteenth section authorizes the assignee to sue for and recover the estate and assets of the bankrupt.

If the transfer of property and payment of money alleged in the complaint were void, then no title passed to the defendants and the same belonged to the bankrupt at the time of the appointment of the plaintiff, and passed to him in virtue of the proceedings and appointment (2 *B. R.*, 131, 82; 6 *Allen*, 292; 15 *Penn.*, 385; 2 *H. Bl.*, 451, 308; 35 *Penn.*, 308; 8 *S. & M.*, 703; 10 *Met.*, 583; 101 *Mass.*, 109.)

The court has jurisdiction over the subject-matter of this action, unless some provision of the act in question has conferred it exclusively upon some other tribunal, or by express provision prohibited this court from taking cognizance of actions in behalf of assignees in bankruptcy.

It is insisted by the learned counsel for the defendants that this court has no jurisdiction of the subject-matter, and cannot afford the relief asked for by the plaintiff's complaint.

As already observed, the action is to recover both property and money which belonged, by reason of the bankrupt's fraud, to him at the time of the plaintiff's appointment.

The plaintiff having the legal title to the cause of action, it is now insisted he shall have no relief in this court, because no express words are found in the act conferring upon a state court jurisdiction, and because jurisdiction is conferred upon the United States district court and the several circuit courts of the United States.

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Section one of the act confers jurisdiction upon the district courts in these words, viz. : " They shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy ; and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act."

Section two of the act provides, " That the several *circuit* courts of the United States, within and for the district where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and, except when special provision is otherwise made, may, upon bill, petition or other proper process of any party aggrieved, hear and determine the case as a court of equity."

It will be observed that, as to both courts, the words are general and permissive in their character. There are no words conferring on either or both *exclusive* jurisdiction. In the case of *Dudley* agt. *Mahew* (3 *Comstock*, 9) it was resolved that state courts have no jurisdiction over patent cases ; but it was shown in the very able opinion of STRONG, J., that the act of congress, by its very terms, conferred exclusive jurisdiction upon the United States courts to enforce its provisions.

It contained provisions which could only be enforced by such courts, and that act was the foundation of the rights. The power to issue injunctions was given, to be exercised upon such terms and conditions as such courts may deem reasonable.

That case is not an authority controlling the question here presented. The acts are quite dissimilar in their provisions. That the congress did not intend to confer exclusive jurisdiction upon the district and circuit courts of the United States, is favored by the provision found in the latter part of the second section of the act under consideration.

It is enacted " That no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching

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the property and rights of property aforesaid, in any *court whatsoever*, unless the same shall be brought within two years from the time the cause of, accrued for or against such assignee."

Had the intention of the originators of the act been to confer exclusive jurisdiction upon the district and circuit courts, why use the words "in any court whatsoever," in the provision quoted?

By section 16 of the act, it is provided that the assignee shall have the like remedy to recover all said estate, debts and effects, in his own name, as the debtor might have had, * * * and if an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee, the assignee shall be admitted to prosecute the action in his own name in like manner and with effect as if it had been originally commenced by him.

In none of those provisions can any language be found which prohibits the assignee from entering any tribunal having original jurisdiction over the subject-matter and parties.

The language conferring the remedy by action is broad and unrestricted. *No provision is to be found in the act depriving this court* of jurisdiction in cases where the assignee has a right to sue and recover. It does not lie in the mouth of these defendants to say, true, we have the property of the bankrupt or his assignee, but we will only respond in the court appointing the assignee.

This court, has in numerous cases, allowed assignees in bankruptcy to maintain actions of this character under the several laws of bankruptcy (1 *Johnson*, 370; 3 *Sandf. Chy.*, 527; 3 *Alby. Law Jour.*, 290; *opinion by DWIGHT, J.*; 5 *John.*, 412; 2 *Lans.*, 377; *S. C.*, 47 *N. Y.*, 261; *Gilbert agt. Priest, MS. opinion by DOOLITTLE, J.*).

The defendants' learned counsel asserts that "state courts are not amenable to congress, and that the state sovereignty may at any time deny the use of its tribunals to enter law-

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suits in favor of assignees in bankruptcy, and neither congress nor federal courts could prevent it." Suffice it to say, no such denial has been made by this state in its sovereignty, nor has there been found any good reason or pressing necessity for such denial.

A more wholesome doctrine than that of the counsel is expressed by PECKHAM, J., in *Middlebrook agt. Broadbent* (47 N. Y., 448). He says: "State courts have jurisdiction of all legal questions not forbidden by the constitution and by the laws of the United States, passed in pursuance of its authority. But the courts of the United States have cognizance of such matters only as are given by the constitution and by the acts of congress passed under its authority."

The defendants' demurrer must be overruled, with liberty to answer within twenty days upon payment of costs.

NOTE.—The foregoing opinion is very ably and satisfactorily indorsed by the court of appeals in the case of *Cook agt. Whipple et al.*, a note of which has recently been published in the *Albany Law Journal*, as follows: "Jurisdiction of state court at suit of assignee in bankruptcy.—This action was brought in the supreme court of this state by plaintiff, as assignee in bankruptcy of C., to recover money and property alleged to have been transferred to and converted by defendants with the view of preventing its coming to the assignee. Defendants insisted that the supreme court had no jurisdiction, and hence the complaint should be dismissed. *Held*, That the supreme court has, under the constitution and laws of this state, jurisdiction of all cases in law and equity, and there being nothing in the bankruptcy acts limiting such jurisdiction, plaintiff, as assignee of C., had a right to bring an action, either legal or equitable, in that court, to recover the property of the bankrupt. The state courts have concurrent jurisdiction with the United States courts in such action. Opinion by GROVER, J."—REP.

People agt. Commissioners of Taxes, &c., in the City of N. Y.

SUPREME COURT.

THE PEOPLE *ex rel.* THE BROADWAY AND SEVENTH AVENUE RAILROAD COMPANY agt. THE COMMISSIONERS OF TAXES AND ASSESSMENTS IN THE CITY OF NEW YORK.

THE SAME *ex rel.* SIXTH AVENUE RAILROAD COMPANY agt.
THE SAME.

THE SAME *ex rel.* SECOND AVENUE RAILROAD COMPANY agt.
THE SAME.

THE SAME *ex rel.* BLEECKER STREET RAILROAD COMPANY agt.
THE SAME.

THE SAME *ex rel.* THE DRY DOCK RAILROAD COMPANY agt.
THE SAME.

The commissioners of taxes and assessments in the city of New York, in estimating the value of the *capital stock of the city railroad corporations*, should deduct from the *actual value* of such stock:

1st. The assessed value of its real estate. 2. The value of United States stock owned by it. 3. The value of stock in other corporations owned by it.

After these deductions are made the provisions of the statutes directing special deductions are complied with, and it becomes the duty of the commissioners to return the balance of the value of the capital stock, subject to assessment.

The *mode* by which the commissioners are to arrive at the *actual value* of the capital stock is not pointed out in the statutes, and the same must be left to the discretion of the commissioners; but they may not disregard any legal rules, and adopt principles erroneous in law, and where they do that their action in fixing such value is subject to review. Beyond that the court will not interfere with such valuation.

In ascertaining such value the commissioners cannot disregard the fact of *indebtedness*. It enters as much into the value of the stock as it does in the assessment of the personal estate of an individual. The capital

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stock should be valued at what it is actually worth. In ascertaining such value the amount of the indebtedness of the company must enter into the estimate.

After making due allowance for the indebtedness of the corporation as diminishing the value of its capital stock, then the estimate of the commissioners will be *conclusive*, and with it the court should not interfere, as no further deduction of its valuation can be legally made.

First Department, New York General Term, December, 1873.

Before INGRAHAM, P. J., FANCHER and BRADY, JJ.

CERTIORARI to the commissioners of taxes and assessments of the city and county of New York.

INGRAHAM, P. J.—The question submitted to the general term in these cases is whether the commissioners of taxes and assessments, in estimating the value of the capital stock of these corporations, should deduct from such valuation the amount of their indebtedness?

This question arises upon that provision of the statute of 1857, volume 2, page 1, which says: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stocks in other corporations actually owned by the said company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county."

In making this assessment the commissioners valued the capital stock at its actual value, deducted therefrom the value or cost price of the real estate, returned the balance as the sum in which the company should be assessed, and refused to deduct the amount of indebtedness by each company from such valuation. The relators object to this rule of assessment as contrary to the intent of the statute.

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The deduction of the value of the real estate is provided for in the statute, the reason for which is apparent from the fact that such real estate is taxed otherwise, and the relators would pay such taxes in that form.

The value of United States stock is also to be deducted when any is owned by a corporation, although it forms a part of the value of the stock, under the decision in *The Bank Tax Case* (2 Wall., 200).

The value of stock in other corporations is deducted by direction of the statute, and the reason is that such corporation is taxable upon its capital stock, and it is paid by that corporation on the stock so owned.

After these deductions are made, the provisions of the statutes directing special deductions are complied with, and it becomes the duty of the commissioners to return the balance as the value of the capital stock, subject to assessment, unless the relators are right in claiming that their indebtedness is also to be deducted.

The mode by which the commissioners are to arrive at the value of the capital stock is not pointed out in the statute above referred to, and I am of the opinion that the same is left to the discretion of the commissioners, in the same manner as the valuation of any other property is left to them, subject to such general rules of law as should govern them in discharging their duties. They may not disregard any legal rules and adopt principles erroneous in law, and where they do that their action in fixing such value is subject to review. Beyond that the court will not interfere with such valuation.

In ascertaining such value, the commissioners cannot disregard the fact of indebtedness. It enters as much into the value of the stock as it does in the assessment of the personal estate of an individual. If an individual owns \$1,000 worth of personal estate and is indebted \$1,000, there is no value in personal estate remaining on which he can be assessed. This is provided for by statute, which directs the

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valuation of the personal estate in gross and then directs the deduction of indebtedness. In regard to corporations the mode is different, but the result should be in effect the same. The capital stock should be valued at what it is actually worth. In ascertaining such value, the amount of the indebtedness of the company must enter into the estimate. If the nominal capital of the company is \$100,000 and it is worth par, and the company is indebted \$100,000, there would be no value in the stock to be assessed. If under such circumstances the commissioners refuse to take into consideration the indebtedness, and assess the stock at its value, without diminishing such valuation on account of the debts of the company, they violate a legal principle which exposes their action to review by the courts. If, on the other hand, they take into consideration the indebtedness of the company, and fix the value of the stock at what, in their judgment, the same is worth, making due allowance for the indebtedness of the corporation as diminishing such value, then the estimate of the commissioners would be conclusive, and with it we should not interfere.

These remarks are intended to apply to the legal principles which should govern the commissioners in ascertaining the value of the stock, but are entirely distinct from the ground claimed by the relators, viz.: That after the valuation is made according to this rule, there should also be deducted from such valuation the total amount of indebtedness of the corporation. Such was not the intent of the statute. To carry out that principle would give the relators a double deduction for their indebtedness; first, by considering it as diminishing the value of the capital stock, and then by deducting it from the valuation, in making which an allowance had been made to the extent which such indebtedness diminished it. There is nothing in the statute calling for any such deduction, after the value has been ascertained, as before stated.

It was said on the argument that the statute required the assessment to be made in the same manner *as other personal*

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and real estate of the county. These words do not apply to the assessment, but to the taxation, so as to call for the same rate on the valuation as is applied to personal and real estate. It is clear that this is not intended to apply to the case of corporations in the assessment of their capital stock, because no such rule exists as to real estate. There the real estate is valued and no deduction made therefrom for indebtedness at all. Nor is it the case in the valuation of personal estate, because the personal estate is valued at its full value and the debts are deducted, while the stock is valued at its actual worth after due allowance has been made by the commissioners for the amount which such value is diminished by indebtedness. The conclusion therefore is, that after the actual value of the stock has been ascertained, and in doing this proper consideration has been given to the indebtedness of the corporation, no further deduction is to be made of such indebtedness.

I have discussed this question solely with reference to the statute, without stating the decisions of the courts on the construction of this statute. There is nothing in the cases referred to which will conflict with the views above expressed. In the *People ex rel. Bank of Commonwealth agt. The Commissioners* (32 Barb., 509) it was held that the assessment was on the capital stock and not on the property of the corporation, and that United States stocks were not to be deducted from such valuation. This was affirmed in court of appeals (23 N. Y. Reports, 192); and although the supreme court of the United States reversed those judgments, it was upon the express ground that stocks of the United States could in no form be taxed by state authority, but were exempt. In the opinion of Mr. justice NELSON, in *The Bank Tax Case* (2 Wall., 200) he says, in reference to the act of 1857, the "actual value of the capital, as assessed by the commissioners, is prescribed. The commissioners were bound to look into the financial condition of the banks, into the investments of their capital, losses and gains, and ascertain, the

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best way they can, the sum of present value as to the basis of taxation. It involved an inquiry into the whole of the financial operations of the bank, its several liabilities and its available resources." These remarks show that the learned justice, although he considered the tax to be upon the property of the corporation, also considered that the valuation was to be upon the stock after an examination of the value of the property of the corporation and its financial condition.

There seems to be some conflict of opinion in the cases upon the question whether the tax is upon the franchise or upon the property of the corporation. In deciding the present cases it will be found not to be a material distinction. If upon the franchise, it must be valued, and that value will be increased or diminished by the additional value of its property and the amount of its indebtedness; but in all cases the assessors are to consider all these things in ascertaining the value of the stock.

In *The People agt. Ferguson* (38 N. Y., 91), the relators claim there is authority for the views they have urged upon the court. That case, however, only sustains the rule of assessment as hereinbefore stated. HUNT, C. J., says: "It was the duty of the assessors to act upon the evidence before them, and to adjudge how much the actual value of the stock was reduced by these (contingent) liabilities, and to deduct accordingly." It was not intended that such amounts were to be deducted from the appraised value of the stock, but that in estimating such value the assessors should allow for what, in their judgment, such value was diminished by the liabilities of the company, whether certain or uncertain, and assess the value of the stock accordingly.

In *Oswego Starch Factory agt. Dalloway* (21 N. Y., 458), DENIO, J., expresses the opinion that the value of the stock might be ascertained by sales of stock as well as by other modes, as directed in the statute relating to manufacturing and turnpike companies.

With these views as to the construction of the statute, it

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seems to be the intent to value not the property but the stock of the corporation; that such valuation of the stock shall include an inquiry into the condition of the company, embracing not only the amount of property owned by the corporation, but the amount of its debts and liabilities, whether ascertained or contingent; that the value, when so ascertained, is to be reduced by deductions of the value of property held by the corporation which by law is exempt or taxable in some other form, and the balance remaining is to be the assessed value of the capital stock of the corporation on which the tax is to be imposed.

In this mode of valuation the amount of property owned by the corporation, its debts and its contingent liabilities, are all to be taken into consideration, and there would be no propriety or justice in again deducting from that valuation an indebtedness for which full allowance was made in ascertaining the value of the capital stock.

The application of these rules to the cases before us will dispose of all the questions which have been raised therein.

In all of them the commissioners fixed the value of the stock, in the first instance, at the par of the stock, making the amount in each case the nominal amount of the capital stock.

On receiving objections from the several companies they were called upon to furnish a new statement, in which an inquiry was answered as to the then value of the stock.

The commissioners thereupon adopted the value of the stock as returned by the officers of the companies, under oath, and reduced the amount accordingly. In no case was such valuation made any larger than was returned by the officers.

Although it is apparent that in this valuation the whole amount of indebtedness was not allowed as deducted from the par value of the capital stock, yet there is every reason to suppose that the commissioners governed themselves by the estimated value furnished by the companies. Such esti-

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mated value could only have been based upon an allowance of whatever diminution the debt caused in the value of the stock, and where it exceeded the difference between the capital and the debt, we must conclude that, in the opinion of the officers of the companies as well as of the commissioners, the stock had an intrinsic value beyond that difference, which was properly estimated in fixing its real value.

Thus in one road the value of the stock was fixed by the officers at twenty per cent; the capital stock at par was \$900,000. The valuation was reduced to that value—viz., twenty per cent. Here, it is apparent, a larger deduction was made than the indebtedness, which was \$700,000.

In another road, the Sixth Avenue Railroad Company, the officers of the company returned the value of the stock at 128 per cent, and the commissioners adopted the value so returned by them instead of the par value. In this case it is evident that the stock was valued at a rate much higher than its par value, and that such value was an estimate of its worth over and above any indebtedness of the company.

We cannot adjudge upon these facts that such indebtedness did not enter into the valuation. If it did then whether or not such valuation was excessive or beneath the real value is not a question for review by us. If it were, the whole tax-list could be brought by individuals before the court to have the valuation of their property reduced whenever they considered their property valued at too high a rate. Such valuation, as before stated, if made according to correct legal principles, becomes a question of fact with which the courts do not interfere.

Under the system as it existed before corporations were assessed and taxed on their capital stock, such stock was liable to taxation in the names of the individual stockholders. The stock was then valued at its market value, and this of course made allowances for the financial condition of the company, but no deduction was made for the indebtedness of the company, except in ascertaining the value of the stock.

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That system of valuation is still continued, with the exception that it is made against the corporation and not against the individual stockholder.

An objection is taken to this proceeding that the commissioners have delivered the assessment rolls to the supervisors, and, therefore, this proceeding should be quashed. In the present cases the writ was served before such return was made, and it was not in the power of the commissioners to defeat a proceeding properly commenced in the manner suggested. All the cases referred to by the counsel for the respondents were cases in which the certiorari was not served until after the assessment rolls had passed out of the hands of the assessors. There will be no difficulty in enforcing obedience to the judgment of the court for this cause. This objection is not material in this case, but it is considered in reference to other cases submitted with this for our consideration.

Judgment rendered for the respondents, and the writ quashed.

Emberson agt. Dean.

SUPREME COURT.

SAMUEL EMBERSON agt. THOMPSON DEAN.

Where a *real estate broker* on receiving a piece of real estate from the owner for sale, being apprehensive that an adjoining owner may purchase it, proposes to the owner that if such adjoining owner does purchase he (the owner) shall pay the broker his *commissions*, as such prospective purchaser, being unfriendly to the broker, would not purchase from or through him, to which proposition the owner assents, and the property is subsequently sold to such adjoining owner, the broker is entitled to his commissions from the owner, although it is claimed by him that the property was sold by another firm of real estate brokers and that the plaintiff had nothing to do with the sale of it.

The verdict of the jury, upon conflicting and contradictory testimony in such cases, in favor of the plaintiff, held conclusive.

New York Special Term, May, 1872.

MOTION by defendant for a new trial.

Plaintiff sued to recover commissions on sale of real estate belonging to defendant. Defendant denied employment and sale by or through plaintiff's agency.

Evidence showed on the part of plaintiff that he was employed by defendant to sell the property, consisting of house, lot and furniture, at Tarrytown, N. Y., for \$60,000; that he spoke to Mr. Roberts and desired him to buy it; that before doing so he (plaintiff) said to the defendant that he would not take hold of the property unless he (defendant) would protect him against Mr. Roberts, who owned the adjoining property; that Mr. Roberts would buy the place or he would get some friend of his to buy it, and being unfriendly toward the plaintiff, would not buy it from him, and he would lose his commission, &c.; that the defendant then told him that if Mr. Roberts or any of his friends

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bought it he (Dean) would pay the plaintiff's commission. Plaintiff further showed that the property was sold to Mr. Roberts and conveyed to his wife for the price of \$50,000.

On the part of the defendant it was proven that the sale to Mr. Roberts was effected through the agency of Mallory, Blackwell & Co., and that the plaintiff had nothing to do with it, and the defendant denied the conversation and agreement as to commissions, as testified to by the plaintiff.

The only question submitted to the jury was whether the agreement between the plaintiff and defendant, on a payment of commissions in case Mr. Roberts bought, was or not made, the court charging that if it was made the defendant was entitled to a verdict.

The jury found for the plaintiff, and the defendant moved for a new trial.

T. G. SWARTWOUT, *attorney for plaintiff.*

J. SADLER, *attorney for defendant.*

J. R. DOS PASSOS, *of counsel.*

BRADY, J.—The plaintiff's claim rested upon the alleged understanding that if Mr. Roberts purchased the defendant's property he was to be paid a commission. He was to be protected against Roberts, because the latter was unfriendly to him, as he believed, and would not buy from him or through his agency. The plaintiff, having made this contract with the defendant, entered upon the discharge of his office, advertised the property, spoke to Roberts about it, advising him to buy, and to others as well. The agreement was not an unreasonable one on the part of the plaintiff. If he believed that Roberts would buy, but not from or through him, it would have been a waste of time and money to have taken any steps to sell and to have advertised the property for sale, and hence it was natural that he should have protected himself against such a contingency. It may be said that the defendant acted unwisely in making such a contract, or that it was unusual and extraordinary. All that may be conceded, and yet the contract

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may be established and sustained. If it were not for the infinite and still-continuing varieties of contracts, agreements and understandings, in which a palpable departure from the ordinary mode of dealing with the particular subject involved is shown, the courts would have less to do, and the volumes of reports be numerically less formidable. The defendant had the benefit of all that his denial of the plaintiff's statement entitled him to. The jury were told that in cases where a conflict of evidence marked the trial, they might consider the inherent probability of the claim advanced, and the statement on which it was based. In deliberating upon the case, they determined that the plaintiff's story was true, and that he was employed to sell upon the understanding that if Mr. Roberts became the purchaser he should be paid his commission. It cannot be said that the testimony is so clearly in favor of the defendant as to justify the impression that the jury acted from bias, partiality or corruption. There was a conflict of evidence, and a finding either way might have been made without doing violence to any rule of law applicable to trials by jury. It has often happened that courts have been dissatisfied with verdicts rendered, but that does not, in my judgment, militate against the system. I have great confidence in the trial by jury, although I do not believe it to be a perfect mode of disposing of disputes. I am not aware of any plan which is.

I think a new trial cannot be granted.

Bixby agt. Warden.

SUPREME COURT.

CHARLES E. BIXBY, respondent, agt. JAMES WARDEN,
appellant.

The first subdivision of section 371 of the Code applies to *all cases of appeal* from a judgment of a justice's court where a *new trial* is to be had, and is not limited to cases depending upon questions of *law only*.

Where under this section one good ground is stated in the notice of appeal, to wit: "That the judgment should have been more favorable to the defendant in this, to wit: it should not have been for a larger amount than ten dollars," it is sufficient to govern the *costs* on the appeal.

Where the plaintiff in an action of trover before the justice recovered against the defendant the sum of \$100, and on the defendant's appeal for and a new trial had in the county court the plaintiff recovered \$83.88, *held*, that the defendant was entitled to the costs of appeal to the county court and the costs of appeal to this court.

Third Department, General Term, Albany, March, 1873.
Before POTTER and DANIELS, JJ.

THIS case comes before us upon a reargument allowed by the court upon motion made for that purpose at a former term.

The case is an appeal from an order of the county court of Cortland county, denying a motion made by the defendant therein to strike out the costs in the case allowed to the plaintiff by the clerk on an adjustment, and to allow costs of the appeal from the justice's court to the county court to the defendant.

The motion was denied by the county court and an appeal taken to this court in the sixth district, where the order of the county court was affirmed. A motion was then made to the court in this department for a reargument of the case, which motion was granted, and the case is now before us upon the

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reargument upon the merits. The action in the justice's court was trover for a horse and a recovery by the plaintiff for \$100. The notice of appeal from the justice is as follows: "The judgment should have been more favorable to the defendant, to wit: it should not have been for a larger amount than ten dollars. It should have been for the defendant and for his costs. It was too large a judgment. This appeal is brought for a new trial in the county court."

On the trial in the county court the plaintiff recovered \$83.88. The plaintiff made no offer to correct the judgment.

O. PORTER, *for plaintiff, respondent.*

H. BALLARD, *for defendant, appellant.*

PLATT POTTER, J.—The recovery below in the justice's court exceeded fifty dollars. The appeal, as was specified in the notice, was for a new trial, and the case was tried in the county court upon the issues joined before the justice by a jury. Both parties tried it as a trial upon an issue of fact, and the only question in the case is which party is entitled to costs in the action. Besides the matters set forth in the notice above, it was also stated "that the verdict is against evidence," and also "that the verdict is against the law of the case." These two grounds have no influence upon the question of costs under section 371 of the Code. They require not that the judgment rendered be reduced, but for a different judgment. They do not specify in particular that the judgment in question should be more favorable to the appellant. Except for the other ground specified in the notice, the provisions of section 371 would not apply to the case. Such notice may be sufficient under the provisions of section 353 to give the county court jurisdiction of the case, but the defendant under them would only recover costs in the contingency of having judgment entirely in his favor in the county court.

This case, as it is now before us, must depend upon the sufficiency of that portion of the notice which states "the

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judgment should have been more favorable to the defendant in this, to wit: it should not have been for a larger amount than ten dollars." It is in this *particular*, viz., the *amount* of the judgment, which the defendant claims should be more favorable to him.

This question is no longer to be regarded by this court as an unsettled question. The case of *Younghanse v. Fingar*, which has the views of the court of appeals upon it, and is reported in 47 *N. Y.*, 99, and the same case, which is expressly adjudicated by this court and reported in 63 *Barb.*, 99, must end discussion of the legal sufficiency of the notice in this case. It is against the respondent's views.

But the respondent's counsel urges a new view, and with great ingenuity urges that section 371, and the offer provided for therein, does not apply to appeals for a new trial, but to appeals to questions of law only. If this position is the true one, the bar at large, and the courts, without exception, so far as I know, have been practicing and adjudicating under a mistaken view of these provisions of the Code. One entire chapter of the Code (chap. 5), eleven sections, is devoted to this subject, the whole of which are harmonious, and so divided, and yet connected, as to complete a system of practice providing for trials of issues of law and issues of fact, and with suitable provisions applicable to each. An analysis of these eleven sections, showing the appropriate office of each section, will show harmony instead of conflict, and will also show the mistaken view of the respondent.

Appeals from justices' courts to county courts are now entirely controlled by the provisions of the Code, beginning with section 351, which repeals all other practice, and ending with section 371.

Section 352 specifies the cases in which appeals may be brought. First, those in which a new *trial* may be had, viz., cases where the demand exceeds fifty dollars. Second, the cases which are exceptions, viz., cases in which the claim, though it exceeds fifty dollars, exclusive of costs, yet the

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notice of appeal states that the appeal is taken upon questions of *law* only.

Section 353 prescribes the time within which the notice of appeal must be brought, and requires that such notice shall state the grounds of the appeal.

Section 354 prescribes the time within which the notice of appeal must be served, the manner of serving, the persons upon whom it must be served, what costs the appellant must pay on appealing, what security he must give and what other steps he must take to render his appeal effectual.

Section 355 relates to obtaining a stay of execution.

Sections 356, 357, 358 and 359 prescribe the form of security for a stay of execution, and the manner of serving the papers to effect that object.

Section 360 relates to the return of the justice to the appeal, and how it may be compelled and distinguished between returns made in cases, first, where the claim is below fifty dollars, and those where the appeal is upon questions of law; and, second, cases where the claim litigated exceeds fifty dollars, and a new trial is desired in the county court.

In the former, the testimony given is required to be returned by the justice; in the latter not.

Sections 361, 362 and 363 provide for obtaining returns in cases where the justice has gone out of office, for amendments to defective returns, and where a justice is dead, removed from the state or insane.

Section 364 provides for the manner of hearing in the county court. 1st. Where a new trial is *not* to be had; and 2d. Where a new trial *is* desired to be had.

Section 365 directs upon what papers the hearing shall be had in the appellate court.

Section 366 directs first upon what principles the appellate court shall review the case; and what powers they may exercise over the case and the parties in both classes of cases, viz., where new trials are *not* to be had, and in cases where they *are*. This section has six subdivisions. The first relates

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to cases where the issue before the justice was an issue of law and confers power upon the county court to allow amendments to pleadings, &c. The second subdivision is only an extension of the same power. The third subdivision authorizes the court, upon a certain contingency, to try a new issue, to be joined under their direction; to be tried by a jury, and to proceed to such trial. The fourth subdivision directs that such last-mentioned issue, so joined, or an issue brought up by appeal, shall be tried in the supreme court.

The fifth subdivision first specifies what power the county court possesses over its own determinations in such cases, and what liberality they may allow to the parties in cases where new trials may be had; and it also allows to *either party, at any time before trial*, to serve on the opposite party an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect in such offer specified, and with or without costs, as said offer shall specify. It then further provides that if the party receiving such offer accept the same and give notice thereof in writing within ten days, he may file the return and offer, with an affidavit of service of notice of acceptance thereof, and the clerk shall thereupon enter judgment according to said offer. This subdivision then declares what shall be the effect and liability of the parties to the undertaking in such case. It then provides that if notice of acceptance of such offer be not given, it shall be deemed withdrawn and cannot be given in evidence; and it then provides that if the party to whom such offer is made shall fail to obtain a judgment more favorable to him than that specified in said offer, then he shall not recover costs, but must pay the other party's costs from the date of the service of the offer.

This fifth subdivision of section 366, it should be remarked, was enacted in 1865, three years after the provisions of section 371.

The sixth subdivision of section 366 prescribes the practice in making up cases for new trials.

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Section 367 directs what papers shall be entered with the clerk for making up the judgment.

Section 368 directs to whom costs shall be given upon the judgment upon reversal or affirmation, but does not specify what costs.

Section 369 prescribes the practice in obtaining a restoration of a judgment collected, if afterwards reversed.

Section 370 provides for set-offs when one party recovers damages and the other party costs.

Section 371, the last section in the chapter, was introduced in 1862 as a new system of practice, by allowing an appeal not only to the county court, but to the conscience and apprehensions of the prevailing party, by placing him in a condition of peril as to future costs, in case he failed to reduce or otherwise modify an unjust or an unconscientious judgment; and it prescribes the proceedings of the parties to this end, and imposes the penalties for the omission to follow its spirit.

The first subdivision of this section, it is plain to be seen, from its general language, applies to all cases of appeal where the parties desire a new trial, and is *not* limited to cases depending upon questions of law.

In this, the respondent's counsel is in error. It declares, in *terms*, that it applies to all cases of appeal. It relates to costs; it prescribes the amount of costs; it provides that the prevailing party shall be entitled to them, *except in the cases where the appellant states the grounds of error in a particular form, where the prevailing party omits to modify, and where he secures a less favorable judgment on a new trial.*

This section is not at all in conflict with subdivision five of section 366.

The offers therein referred to are to an entirely different stage of the case, and under different proceedings. This provision of section 366 was enacted three years later than the other, does not repeal it, is not repugnant to the other, but is in harmony and in spirit the same, for another state of the

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proceedings. Both provisions are in full force; both are necessary to complete the system. Nor does an apparent inconsistency in the *ground* of appeal in this case affect the case.

Two of those grounds make it a good appeal under section 353, but give no advantage as to costs, as under section 371. One good ground was given in the notice, under the provision of section 371, to allow of the benefits of the provision as to costs, and that was a good notice. The case was tried upon that theory, without objection, and both parties claimed costs under it.

By the provisions of that section the appellant is entitled to costs, as the law is now fully declared. These he has been denied by the order of the county court. The result is, that the order of the county court appealed from should be reversed; the adjustment of costs in favor of the plaintiff by the clerk and judgment thereon be set aside; the clerk of Cortland county directed to adjust the costs in this case in favor of the appellant, and insert them in the judgment roll; that the appellant recover costs of the appeal to the county court and costs of appeal to this court.

Elsworth agt. Muldoon.

SUPREME COURT.

HENRY ELSWORTH agt. KIEREN MULDOON.

The *redemption of land*, by a *judgment debtor*, sold on execution against him, is governed by the statute. (2 R. S. [Edm. ed.], 384, § 46.)

And it is no valid objection to such redemption that the judgment debtor had, subsequent to the sale, conveyed the premises to a *receiver*, appointed for the benefit of his creditors. Such a conveyance, in its nature, creates a trust for creditors. Subject to the execution of the trust the reversion belongs to the execution debtor, and he has sufficient interest to redeem.

The statute gives the right of redemption to an execution debtor, irrespective of the situation of the title. (*The decision in Husted agt. Dakin*, 17 Abb., 137, *disapproved*.)

A sale of land under an execution is not conclusive against the execution debtor before the expiration of one year from the sale. (2 R. S., 370.)

Where the execution debtor, in proper time, produced the sheriff's receipt for \$72.05, containing the title of the cause in the judgment upon which the premises were sold, stating that "said money was so paid by him to redeem property sold under an execution in the above entitled cause on the 13th day of April, 1848, situated in the Twelfth ward of the city of New York; the above amount being in full for the purchase-money and interest at ten per cent for all the property sold by me on that day under said execution;" upon which receipt was indorsed in the handwriting of the attorney for the judgment debtor, stating "I paid the sheriff the above money and took the receipt for F. Price" (the judgment debtor):

Held, that this paper was, in substance, a sufficient certificate of redemption under the statute of 1847.

It was not necessary that this certificate of redemption should be proved or acknowledged or filed. The redemption under the statute was complete when the money was paid to the sheriff.

As in this case the receipt of the sheriff was an official act, and all the parties were deceased who took part in the redemption, it was competent, after proof of such decease, to read the paper in evidence.

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N. Y. Special Term, January, 1873.

PARSONS & KETCHUM, *for plaintiff.*

EGBERT & ARNOUX, *for defendants.*

FANCHER, *J.*—The plaintiff has shown sufficient actual possession to enable him to prosecute this proceeding to determine the claim of the defendant to the premises in question.

The principal inquiries are, 1st. Whether Francis Price, the original owner, could, at the time it was attempted, redeem the premises from the execution sale thereof; and, 2d. Whether he did effectuate such redemption. If these inquiries are answered in the affirmative, the asserted claim of the defendant to the premises is expunged by the superior title of the plaintiff.

Lands were formerly sold under execution in the same manner as personal property, and, until 1820, the rule in New York was, to sell under execution the real estate absolutely at auction, upon due notice, without appraisement, and without any subsequent right of redemption. The sheriff thereupon executed a deed to the purchaser, which vested the defendant's title in the purchaser from the time of the sale. It was found that sales of real estate on execution had been attended with much oppressive speculation upon the necessities of the debtor, and therefore the legislature of this state provided by statute an effectual relief from the peremptory and sweeping desolation of an execution sale.

The Revised Statutes contain the following language: "Such redemption may be made:

"1. By the person against whom the execution was issued and whose right and title were sold in pursuance thereof; or,

"2. If such person be dead, by his devisee of the premises sold, if the same shall have been devised, and if the same shall not have been devised, by the heirs of such person; or,

"3. By any grantee of such person who shall have acquired an absolute title by deed, sale under mortgage or under an

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execution, or by any other means, to the premises sold, or to any lot, tract, parcel or portion which have been separately sold" (2 *R. S.*, *Edmonds' St.*, 384, § 46).

The dawn of this benign provision for redemption first appeared in the enactment of April 12th, 1820 (*Laws of 1820, chap. 184*, § 3). It was passed to repress a mischief against which the law did not provide, and, according to true interpretation, it must be treated as a remedial or beneficial statute, and be so read as to cure the former defect in the law and to advance the remedy intended. If the directions of the statute be complied with, the relief provided by it is secured. It is only necessary, in this case, to give to the statute the natural and obvious sense which its language imports, without resorting to any subtle or forced construction, either to limit or extend its operation, and it will be plain that the statute conferred on Francis Price the right to make the redemption of the premises in question from the sale under the execution issued against him. It is conceded that the redemption was in due time; that he was "the person against whom the execution was issued, and whose right and title were sold in pursuance thereof." He was, therefore, the very person on whom the right of redemption was conferred by the express language of the first subdivision of the statute; yet it is argued that, by reason of his conveyance to a receiver, he was excluded from all redemption interest in the land, and could not, by his redemption, extricate it from the execution sale. The argument against the right of redemption imports into the statute language which is not to be found there; and were the statutory right of redemption fettered by such a restriction, doubtless its removal would, long ago, have been effected by the legislature.

The statute does not say that the person against whom the execution was issued may redeem his lands from an execution sale, *provided* the title by grant of the lands remains in him. On the contrary, it gives the right of redemption to the execution debtor, irrespective of the situation of the title.

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Suppose a sale of land on an execution for \$100, and that the owner the next day should sell the land for \$100,000, and execute a deed with full covenants to the grantee, from whom he should, at the same time, receive the full consideration. While the grantee might redeem the land from the execution sale, it would not be his duty, and perhaps not his inclination to do so. It would be the duty of the grantor to make the redemption, and his interest would require it to be done, so that he might avoid liability on his covenants. Should he attempt to make the redemption, is it possible he could be successfully thwarted in the attempt by the pretense that "the right of redemption is such a right *in rem* that it cannot be exercised except by one having, at the time, the legal estate in the premises?" Does not the statute expressly give the right of redemption to "the person against whom the execution was issued and whose right and title were sold in pursuance thereof?" Must he be deprived of the benefit of redemption and subjected to an action on his covenant of title, because of the vague notion that the redemption is a right *in rem* beyond his reach? A sale of land, under an execution, is not conclusive before the expiration of one year from the sale (2 *R. S.*, 370). During that time, the debtor, his devisees or heirs, or his grantees, may redeem. Nor can the deed be given by the sheriff until three additional months have elapsed, during which other judgment creditors and mortgagees may, in the manner provided by statute, acquire the interest of the purchaser at the sale. In *Chautauque County Bank agt. Risley* (19 *N. Y.*, 373), it was held that a debtor's conveyance of his real estate to a receiver, although it may be compulsory, is, in its nature, simply and purely the creation of a trust for the payment of the debts on which the proceedings in equity are founded. The receiver is the trustee, and discharges his duty under the direction of the court. To hold otherwise would be to convert the creditor's suit into a species of execution on the judgment for the specific performance of the lien, so that a title confessedly based on the

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debtor's involuntary conveyance to an officer of the court may relate back to the time when the judgment became a lien. For this conclusion there is no principle or precedent.

The question in *Husted agt. Dakin* (17 Abb., 137) was, who was entitled to certain surplus moneys arising on a sale under foreclosure. The referee awarded the surplus moneys to Husted, who had foreclosed the interest of Dakin in the mortgaged premises at an execution sale. Dakin, the judgment debtor, had attempted a redemption by tendering to the sheriff the requisite amount to redeem. The court, in general term, appears to have held that Dakin's efforts to redeem were ineffectual. But I think the reasoning of the judge who delivered the opinion in that case totally ignores the express language of the statute touching the right of the judgment debtor to redeem; and that the decision there made is without any sound principle or any adjudged case to support it. The learned judge cites, as an authority, *Shepard agt. O'Neil* (4 Barb., 126), a reference to which, and to the cases there mentioned, will show that the principle of the authority referred to was misapprehended when the citation was made.

HAND, J., in *Shepard agt. O'Neil*, said, "I believe it is well settled that, by a sale of land on a judgment, the lien of the judgment and the right to redeem are gone." Several authorities are cited for this obvious proposition. But the principle of that authority, that the lien of a judgment is lost when a sale under execution takes place, and that the right to redeem is also gone, is this, that a judgment creditor loses his lien and his right to redeem, when such a sale by virtue of the judgment takes place. It is not a loss of any right to redeem by the judgment debtor. The authorities cited in the case last referred to are authorities for some familiar propositions, *e. g.*, that a debt is merged in the judgment; that a sale of land under execution extinguishes the lien of the judgment; that a judgment creditor, by such a sale, loses the lien of the judgment and his right to redeem,

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and the like. None of them are authority for saying that the right of a judgment debtor to redeem land from an execution sale is in any way restricted, in case the redemption is made within a year from the sale.

In *Bodine agt. Moore* (18 N. Y., 250), the correct principle is stated. The Kingston Bank held a certificate of sale, which had been running about four months. The debtor did not in person or by any affirmative act redeem from the sheriff's sale. His land was, however, converted into money by sale under a prior mortgage, and a portion of that money, sufficient for the purpose, was paid over in satisfaction of the claim which the bank had under the certificate. The bank accepted the money, and this was in effect, as the court of appeals held, a redemption from the sheriff's sale. It was effected with moneys raised out of the estate of the judgment debtor, which, as the court said, the bank would have been bound to accept if tendered by the debtor himself. It was further said, in the opinion in that case, that "a redemption by the debtor renders a sheriff's certificate null and void as though the sale had never taken place." The very judgment on which the sale was had becomes again a lien, if it was not fully satisfied by the bid, and the land may be again sold. A redemption out of the debtor's funds and effectuated by act of law should have the same effect; it is virtually made by the debtor. If the requisite amount of the surplus had been paid into the debtor's own hands and he had paid it over to the bank, it would have been a perfect and exact redemption from the sheriff's sale within the statute.

In the light of such authority there can be no difficulty in perceiving that Price had a right to redeem by the very terms of the statute (2 R. S., 570, § 46). The objection that his interest was totally divested by the conveyance to Latting is without force. Whether he had any interest in the land or not, the statute gave him the right of redemption; but his interest was not wholly divested by the conveyance to the receiver, Latting. That, as already remarked, was a convey-

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ance which in its nature created a trust for creditors. Subject to the execution of the trust the reversion belonged to Price, and he had sufficient interest to redeem (1 *R. S.*, 730, § 67). So soon as the judgment and charges were paid either by the judgment debtor or out of his property the land conveyed to the receiver Latting would revert to the judgment debtor, and probably when the statute of redemption was framed it was designedly worded to cover precisely such, as well as all other rights of the judgment debtor respecting the redemption of his lands from an execution sale. If the principle that the right of redemption can only be exercised by one having the legal estate in the premises be applicable, as probably it is, to redemptions from tax sales, and to strangers who would unjustly intermeddle with the estate under an execution sale to the prejudice of the real party in interest, it has no such application upon reason or authority to the judgment debtor himself, whose land is sold under execution.

2. The next important question is whether Francis Price did redeem the premises from the sale and execution through which the defendant claims title. The paper, which is dated April 10th, 1849, and signed by John J. V. Westervelt, sheriff, is not only a receipt for seventy-two dollars and five cents, but it contains the title of the action in the supreme court, in which the judgment was obtained, whereon the execution issued under which the sale in question was made.

It also recites the receipt from Francis Price, the judgment debtor, of seventy-two dollars and five cents, and then follows this language: "Said money so paid by him to redeem property sold under an execution in the above entitled cause on the 13th day of April, 1848, situate in the Twelfth ward of the city of New York, the above amount being in full for the purchase-money and interest at ten per cent for all the property sold by me on that day under said execution."

An attorney-at-law made this redemption, and that he acted for Francis Price is shown by a memorandum on the receipt in his handwriting, as follows: "I paid the sheriff the above

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money and took the receipt for F. Price." This paper is in substance a sufficient certificate of redemption according to the fifth section of the statute of 1847, is signed by the officer who in contemplation of law made the sale, and states "all such facts, transpiring before him at the making of such redemption, as are sufficient to show the fact of such redemption" (2 *Laws of 1847, chap. 410, 508*).

It was not necessary that this certificate of redemption should be proved or acknowledged or filed. The redemption under the statute was complete when the money was paid to the sheriff. The sale of the premises under the execution and the certificate of sale which he had given became void by the redemption, and thenceforth were of no force or effect (2 *R. S.*, 371, § 49). As the receipt of sheriff Westervelt was an official act, and all the parties are deceased who took part in the redemption, it was competent, after proof of such decease, to read the paper in evidence.

The memoranda of the attorney of Price, written thereon, was also admissible in evidence (*Leland v. Cameron*, 31 *N. Y.*). Such writings are admissible within the principle of numerous authorities relating to the entries and memoranda of deceased persons. The receipt of the sheriff was a written paper against his interest, for by it he was charged for the amount of money mentioned in the receipt; and the principle applicable to such a paper is that it proves not only the simple fact of payment, but it may be received to every incidental matter stated in the declaration, even in an action between third persons (*Middleton v. Melton*, 10. *Barn. & Cress.*, 317). The rule has been asserted to the extent of a disregard of all reference to the circumstance of any privity between the deceased and the defendant (*Gross v. Wattington*, 8 *Barn. & Cress.*, 556; *Whitmash v. George*, 3 *Brod. & Bing.*, 132).

It is said, in the text of 1 *Phil. on Ev.*, p. 298, that "the acknowledgments by deceased stewards, reeves and baliffs, in their books, of the receipt of money for which they have been

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accountable, are very frequently adduced in evidence by their employers, or those claiming under them, *or by strangers* ; ” and, at page 299, it is remarked that “ receipts for the payment of money, given to the person making the payment, appear to be admissible, after the death of the receiver of the money, to prove the fact of its having been received, though there exist no privity between the deceased and the party against whom the evidence is tendered.” Lord ELLENBOROUGH said, in *Harrison v. Blades*, 3 *Camp.*, 458, that a tax gatherer’s receipts would be evidence, after his death, to prove who was the occupier of certain premises. For further illustrations of the rule, see *Thompson v. Stevens*, 2 *Nott & McCord*, 493 ; *Chase v. Smith*, 5 *Vern. Rep.*, 559 ; *Barker v. Ray*, 2 *Russ. Rep.*, 31, note b ; *Wilbor v. Selden*, 6 *Cow.*, 162 ; *Leland v. Cameron*, 31 *N. Y.*

It follows that the claim of title made by the defendant, founded upon the sale under the execution against Francis Price, is of no validity.

There should be judgment for the plaintiff, with costs, and the judgment should provide that the defendant, and all persons claiming under him, be forever barred from all claim to any estate of inheritance or freehold, or term of years, in possession, reversion or remainder, to the premises described in the notice by which this proceeding was commenced.

Pusey agt. Bradley.

SUPREME COURT.

PUSEY *et al.* agt. BRADLEY *et al.*

In an action to enforce a lien the court has the right, even after the issue joined, to make any person a party who may be necessary to a full determination of the equities involved.

While it is questionable whether a creditor who procures a preference by a lien may not be obliged to surrender it in order to commence proceedings under the bankrupt act, it would be against equity to allow him to urge the bankruptcy of his debtor in one tribunal and in another avail himself of the advantages of his lien.

Proceedings in a state court may be suspended or controlled by the federal courts, not by acting directly on the former, but by acting on the parties through the instrumentality of an injunction.

New York General Term, December, 1873.

BRADY, J.—If the claim of Bradley and Nicholson is not just it can be contested by the company in the proceeding to enforce the lien acquired by the laws of this state (*Chap. 402 Laws 1854, p. 1086, §§ 13 and 14; Laws 1858, p. 324; Laws 1870, p. 1283*). The plaintiffs are not therefore entitled to the continuance of the injunction granted in all respects. This conclusion is the result of several examinations of this controversy, so far as it is disclosed by the papers. If the company was in collusion with Bradley and Nicholson or were friendly to them and their claim, it would be otherwise as to the plaintiff Pusey, but it is not so. The company, on the contrary, are adverse to them and deny the validity of their alleged demand, having already appeared in the action brought to enforce it, and set up substantially the same matters in defense which are here relied upon. Whatever may be legally proved to show the falsity of the claim made, can be given in evidence in the action to enforce the lien. The

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company is therefore in a position to secure its own rights, and, if successful, the apprehensions of the plaintiffs will be groundless; but if otherwise, then the defendants Bradley and Nicholson must be regarded as justified in their proceedings so far as they may be successful. The plaintiff Pusey being only a creditor of the company, and the debtor having done nothing unlawful to his injury, either directly or indirectly, by collusion or otherwise, and the defendants Bradley and Nicholson having resorted to a legal mode of redress, in which the rights of the company can be protected, it seems that he is not in the relation to the parties, or either of them, which entitles him to demand from this court its equitable interference to the extent asked.

It may be here remarked, also, that in the action to enforce the lien there can be little doubt, under the provisions of section 14 of the act creating it (*supra*) and of the Code, that the court in which it is pending has the right, after issue joined, to make any person a party who may be necessary to a full determination of all the equities involved. In regard, however, to the proceedings in bankruptcy, a different result must ensue. The plaintiff Pusey had taken a large amount of the bonds of the company, and the extraordinary proceedings in bankruptcy are, if continued, well calculated to destroy the value of his securities and to deprive him of his compensation for meritorious services in constructing the road, and in that way contributing to the security of the defendants Bradley and Nicholson, assuming their lien to be good. The defendants Bradley and Nicholson cannot avail themselves of their advantages acquired by the lien, and urge the bankruptcy of the company, which might be attended with disastrous consequences, at the same time in different tribunals upon a disputed claim. It would be against principles of natural justice and equity to allow such an oppressive course of procedure. It is true that it may be well questioned whether the creditor who secures a preference by lien is not obliged to surrender it in order to commence proceedings under the bankrupt act, but

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this question we are not called upon now to consider. Upon the propriety of restraining the party in these proceedings, the views expressed by justice FANCHER in this case, at special term, meet with our approbation. The parties to fraudulent or oppressive proceedings in another court may be enjoined.

This is a distinction pointed out in *Schuyler* agt. *Pellissier* (3 *Edw.*, ch., 203, 205), and is recognized in *ex parte Christie* (3 *How. U. S.*, 292, p. 318). Justice STORY declared in the case last cited that proceedings in a state court might be suspended or controlled, not by acting on the courts, but by acting on the parties through the instrumentality of an injunction or other remedial proceeding. And SUTHERLAND, justice, in *N. Y. & N. H. R. R. Co.* agt. *Schuyler* (17 *How.*, 464), pronounced the same doctrine. See also decision of justice INGRAHAM to same effect in same case (8 *Abb. Pr. Rep.*, 239). In this litigation the defendants Bradley and Nicholson and the company are already before this court in another action in reference to the subject-matter of this action, and at the instigation of the defendants Bradley and Nicholson, and there is therefore an additional reason why the control of parties should be exercised. They invoked the jurisdiction of this court and must abide by it. By enjoining them from proceeding in bankruptcy and permitting their action to enforce their lien to proceed, substantial justice will be done to all parties. The order made at special term will be modified accordingly.

INGRAHAM, P. J., concurred.

Kinney agt. Pudney.

OTSEGO COUNTY COURT.

STEPHEN KINNEY, Appellant, agt. ANDREW PUDNEY,
Respondent.

Where the *terms of a parol contract* between the plaintiff and defendant are in dispute, and the evidence presents a question of fact for the justice to determine what those terms were, and he finds in accordance with the evidence and claim of the defendant, unless there has been some error committed in the admission or rejection of evidence; the judgment upon that finding cannot be disturbed.

THIS action was brought by the plaintiff to recover the balance due him from the defendant on account, and also damages for the breach by the defendant of an alleged contract entered into by him with the plaintiff, in the fall of 1870, to build a line fence, in consideration of the right or privilege of cutting what wood he desired to cut from the timber standing on a specified portion of the plaintiff's premises, during the following winter.

The plaintiff recovered judgment in the justice's court for seventeen dollars, besides costs, which included only the value of the wood cut, as damages; that value and the items of account proved amounting to the seventeen dollars.

From such judgment the plaintiff appeals.

JENKS & MATTESON, *for appellant*, on the point that the statute of frauds did not apply to the case, because that part of the contract which was required to be in writing was fully executed, cited *Thomas agt. Dickinson* (2 *Kern.*, 364); *Johnson agt. Hathorn* (2 *Keyes*, 483; 23 *Barb.*, 481); *Bennett agt. Abrams* (41 *Barb.*, 621); *Cagger agt. Lansing* (57

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Barb., 421); *Same* agt. *Same* (4 *Hand*, 550); *Shepherd* agt. *Little*, (14 *John.*, 210); *Allen* agt. *Squire* (3 *Seld.*, 543); *Page* agt. *Monks* (5 *Gray* 492); 30 *How.*, 101.

On the point that this contract was good as a license, cited *Erskine* agt. *Plummer* (7 *Maine*, 447); *Pierpont* agt. *Barnard* (6 *N. Y. R.*, 279); *Bennett* agt. *Scott* (18 *Barb.*, 347.)

D. L. ATKYNS, *for respondent*, 1st. That the contract was void, being within the statute of frauds, cited *White* agt. *Stevenson* (4 *Denio*, 193); *Sattersall* agt. *Hass* (1 *Hilt.*, 58); *Bellows* agt. *Sackett* (15 *Barb.*, 96); 3 *R. S.*, 220, 5 *ed.*, §§ 6 and 8; 29 *Charles I.*, *ch.* 3, §§ 1-4; *Green* agt. *Armstrong* (1 *Denio*, 550); *Warren* agt. *Leland* (2 *Barb.*, 613); *Von Beck* agt. *Roe* (50 *Barb.*, 302); *Goodyear* agt. *Vosburgh* (39 *How. Pr. R.* 377); *Bingham* *Executory Sales*, *R. P.* (176, 200, *ed.* 1872); 3 *R. S. N. Y.*, 221, § 8.

2nd. Good as a license, but not as a contract, *Buck* agt. *Pickwell* (27 *Ver.*, 157); *King* agt. *Brown* (2 *Hill*, 485); *Lisk* agt. *Sherman* (25 *B.*, 433); *Erben* agt. *Lorillard* (19 *N. Y.*, 299); *Bradwell* agt. *Getman* (2 *Denio*, 87); *Wilson* agt. *Martin* (1 *Denio*, 602, 606); *Lockwood* agt. *Barnes* (3 *Hill*, 128); 44 *Barb.*, 162; 45 *N. Y.*, 162; *Nones* agt. *Homer* (2 *Hilt.*, 116); *Little* agt. *Wilson* (4 *E. D. Smith*, 422); 19 *N. Y.*, 299; 39 *How.*, 377.

3d. As to the true measure of damages, 2 *Hill*, 485; 7 *Cow.*, 92; 6 *Met.*, 417; *Silvernail* agt. *Cole* (12 *Barb.*, 685); *Dyer* agt. *Graves* (37 *Vt.*, 369); *Baldwin* agt. *Palmer* (10 *N. Y.*, 232); *Hobbs* agt. *Weatherwax* (38 *How.*, 385); *Ehle* agt. *Judson* (24 *Wend.*, 97); *Fuller* agt. *Reed* (38 *Cul.*, 99); *Thomas* agt. *Dickinson* (12 *N. Y.*, 364); 14 *B.*, 90.

4th. The unperformed part of the contract by defendant to build a fence was within the statute of frauds, *Cook* agt. *Stearns* (11 *Mass.*, 533); 1 *Chit. Gen. Pr.*, 359; *Bennett* agt. *Scutt* (18 *B.*, 347); *Goodrich* agt. *Jones* (2 *Hill*, 143); *Selden* agt. *Delaware, &c.* (29 *N. Y.*, 634); *Houghtailing* agt. *Houghtailing* (5 *Barb.*, 384).

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5th. Void contract amounting to a license, either party could stop short at any time and be protected as to what was done, *Houston* agt. *Laffie* (46 *N. Hamp.*, 505); *Nye* agt. *Taggart* (40 *Vt.*, 295); *Dwineen* agt. *Rich* (22 *Wis. R.*, 550); 1 *Wash. C. C. R.*, 411-419, 2 *ed.*; *Bingham on Executory Sales*, *R. P.* 166, *ed.* 1872; *Swain* agt. *Seamans* (9 *Wall.*, 254).

6th. Although the justice had, at plaintiff's request, adopted a wrong rule of damages, yet having afterwards received proofs establishing a proper measure of damages, it was his duty to apply the rule of law proper upon all the proofs, which he did 4 *Denio*, 131-175; 2 *Hill*, 125; 3 *Barb.*, 388-496; 44 *Barb.*, 641; 43 *N. Y.*, 298; 44 *N. Y.* 396; 45 *N. Y.*, 27.

7th. A contract "to build some fence for some wood," is void for uncertainty, *Peck* agt. *Halsey* (2 *P. Wms.*, 387); *Sutton* agt. *Sutton* (9 *Sim.*, 582); *Firgo* agt. *Cutler* (3 *Stark.*, 139); *Foot* agt. *Webb* (59 *B.*, 38, 236); *Chit. on Con.*, 65 (*cited* 30 *N. Y. Dig.*, 150); *Klimpeter* agt. *Harrigan* (21 *L. Ann.*, 196); 18 *Barb.*, 347; *Swain* agt. *Seamans* (9 *Wall.*, 254).

W. B. EDWARDS, County Judge.—The contract between the parties was by parol. The plaintiff's claim is that the defendant, in consideration of the right to cut what wood he desired during the winter of 1870 and 1871, upon a certain part of the plaintiff's premises, agreed to build the entire line fence between plaintiff's farm and that occupied by defendant, one-half of which the plaintiff was liable to build. That the defendant, under such agreement, had cut and removed all the wood he desired from the plaintiff's premises, at the place specified, and that the agreement on the part of the plaintiff had, in all respects, been fulfilled. That the defendant has failed to build the line fence, and was therefore liable to the plaintiff in damages, and that such damages included the value of such a fence as was to be built.

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The claim of the defendant, on the other hand, is that, in consideration of the wood he might take, he was to build *some fence*, the quantity and kind being indefinite. He also claims that the contract was void by statute, and he is liable only to the extent of the value, in the tree, of the wood which he cut.

The evidence of the plaintiff in reference to the contract is as follows: "Defendant * * * formerly joined farms with me. * * * While he owned this farm we made an agreement to make a fence. A year ago last fall I came up to his house. * * * He said he wanted to make a bargain with me. Said he wanted to get wood on my land that winter where he had been cutting wood the winter before. He said if I would let him get wood where he did the winter before, he would make the line fence clear through the whole of it; the line fence between John Pudney and me. The defendant occupied the farm; he is son of John. He said he had made part of the fence and would make the whole of it. * * I told him I would do it—he might call it a bargain—to get the wood at the place spoken of. * * * He continued getting wood there during the winter. He got all he chose to. He had already built fifteen or twenty rods of this line fence when this agreement was made. He was to build it last spring or fore part of summer. * * * Cross-examination: * * No price agreed upon as to value of the fence; there was nothing said as to quality or kind of fence. He said he had made a piece of board fence and wanted to finish it through. He said he would make the fence all the way through."

The testimony of the defendant as to the contract was as follows: "I told him (plaintiff) I wanted some fence built there, and I said if he would let me go on and cut some wood I would build some fence. He said well, and would come up and show me where to chop. He came and showed me where to chop and I went on and cut. Nothing was said as to the kind of fence I was to build. Nothing was said as

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to how much fence, or as to any distance between any points, or as to how much wood I should get. I did not tell the plaintiff that I would build a good board fence all the way on the line. * * * Cross-examination: * * * I told him we wanted the fence there; that was the first said. I told him if he would let me cut what wood I wanted, I would build some fence. He said I might, and he would show me where to chop. This is all that was said."

From this evidence it is apparent that the terms of the contract were in dispute before the justice. If the contract was as testified to by the defendant, the plaintiff could only recover upon this cause of action the value of the wood cut, which was proved to be some ten dollars. The evidence presents a question of fact for the justice to determine what the terms of the contract were. He has found in accordance with the evidence and claim of the defendant, and unless there has been some error committed in the admission or rejection of evidence, the judgment upon that finding cannot be disturbed.

The justice allowed the defendant to show, under plaintiff's objection, the quantity of wood cut under the agreement, that it was cut from growing timber, and its value per cord in the tree. If the contract had been as the plaintiff claims it was, the same having been fulfilled by him in all respects, and the defendant having received all he stipulated for, or at least all he desired under it, I think he would have been bound to perform what he undertook by the contract to do, and, in default so to do, would have been liable for the damages sustained by the plaintiff by reason of his default, which would include the value of the fence agreed to be built, and in that view of the case the evidence of the quantity and value of the wood cut would have been inadmissible, but the justice has found the contract to be as testified by the defendant. He was authorized so to find, and I think the defendant liable under the contract thus established only for the value of the

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wood cut, and in that view of the case the evidence objected to was admissible.

These are the only rulings made by the justice against the plaintiff which he claims were erroneous, and it follows for the reasons given that the judgment of the justice must be affirmed, with costs.

Dent agt. People.

SUPREME COURT.

EDWARD DENT agt. THE PEOPLE.

Where on a *writ of error* the prisoner claims that his trial, conviction and sentence for a felony should be reversed on the ground that it does not appear that the prisoner was present on the trial, and because it does not appear that the prisoner before sentence was asked what he had to say why judgment should not be pronounced against him, must cause to be made up and returned to this court a *judgment record*.

The return to the writ of error, which contains merely the indictment, the testimony, the charge of the court, the verdict and sentence, which is the ordinary return on a bill of exceptions, is insufficient to present the grounds urged for a reversal by the prisoner.

First Department, New York General Term, June, 1873.
Before INGRAHAM, P. J., BRADY and FANCHER, JJ.

THE prisoner was tried in theoyer and terminer and convicted of a felony. A writ of error was brought to this court. The return to the writ of error contains the indictment, the testimony, the charge of the court, the verdict, and the sentence. No record appears to have been made up, and none is returned to this court.

INGRAHAM, P. J.—To sustain this writ of error it is claimed that the judgment should be reversed, because it does not appear that the prisoner was present on the trial, and because it does not appear that the prisoner before sentence was asked what he had to say why judgment should not be pronounced against him.

There can be no doubt but that both of the matters referred to were necessary to give validity to the proceedings on the trial. The presence of the prisoner is required by statute (3 *Revised Statutes*, 1027). The inquiry as to reasons against the

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sentence has been always deemed necessary in England and this country in capital cases, and generally also in cases of felonies. The only question, therefore, is whether, as this case is presented to us, we have any return that will authorize us to pass upon this question. There is no record of judgment returned to us. The prisoner might, if he had seen fit, required the record to be made up by the district attorney, and, if not done by him, the prisoner was allowed to make it up under the direction of the court (3 *R. S.*, 1031). He has not done so, but contented himself with the evidence and the verdict and sentence.

The law allows the clerk, on the filing of a writ of error, to return a transcript of the indictment, bill of exceptions and judgment of the court, certified by the clerk (3 *R. S.*, 1034). Neither of the matters required to be returned would furnish any evidence as to the ground relied on in this case. It is not necessary, in a bill of exceptions, to state the presence of the prisoner on the trial, nor, in entering the judgment of the court on the minutes, is it necessary to state what preceded the judgment. If the prisoner wishes to avail himself of such objections, he should apply to have the judgment record made up, which, when settled by the court, would show the proceedings on the trial. The decision of the court of appeals in *Messner agt. The People* (45 *N. Y.*, 1), settles the question raised here, if there had been a judgment record returned.

In the present state of the criminal law, the necessity for such strictness could be relaxed without injury to the prisoner. No cases are now tried where prisoners are not defended by counsel, and when the prisoner is present, as he must be to be sentenced, there would seem to be no hardship in requiring him to claim the privilege, if he insists upon it, before judgment is pronounced.

I am of the opinion that this case does not present the necessary facts on which the prisoner's objections are based, and that, if he intended to urge them, he should have applied for the making up of the judgment.

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The bill of exceptions is made by the prisoner, and to permit him to take advantage of omissions made by him therein, would be opening a door for the introduction of a course of proceeding not calculated to entitle the administration of justice to respect.

The judgment should be affirmed.

FANCHER and BRADY, JJ., concurred.

People ex rel. Hawley agt. Earle.

SUPREME COURT.

THE PEOPLE *ex rel.* ELLEN HAWLEY agt. ABRAHAM L. EARLE,
auditor of accounts.

SAME agt. ANDREW H. GREEN, comptroller of the city of
New York.

Where a balance of a *claim* against the county of New York, running from September 1, 1871, to March 1, 1872, for cleaning the court-room of the court of common pleas, the original claim being audited by the board of supervisors of the county, such audit is sufficient authority for the comptroller to pay it where no fraud or mistake is alleged. The claim is a proper one against the county.

Perhaps now it may be necessary to require the auditor of accounts to audit this balance in order to compel the comptroller to pay it.

A mandamus against each officer allowed.

First Judicial District, New York, September, Special Term, 1873.

THESE were motions argued together for peremptory writs of mandamus; one to compel auditor Earle to audit and allow, and the other to compel comptroller Green to approve and pay to the relator the sum of \$312.

The relator was employed in the year 1868, by the board of supervisors of the county of New York, to clean the rooms in the county court-house used by the court of common pleas, and continued in such employment up to August, 1872; except in October and November, 1871, when disabled by a fall from a horse car, the work was done by the relator's daughter and other cleaners.

The compensation to be paid was fixed by a resolution of the board at two dollars per day, and the bill or claim of the relator was audited and allowed May 13th, 1872, by the said

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board at \$416 for her services, extending from September 1st, 1871, to March 1st, 1872.

A part of this sum was paid by the comptroller, but because of alleged absence from duty by the relator, payment of the entire amount due was refused and audit denied.

The moving papers also show that there were funds applicable to the relator's claim; that she was a widow in destitute circumstances, and that the usual demands for audit and payment had been made.

ABRAHAM R. LAWRENCE, *for relator.*

GEORGE P. ANDREWS, *for respondents.*

FANCHER, *J.*—The claim of the relator in the proceedings was audited as a county charge by the supervisors. She had been paid on account of it \$104, leaving a balance of \$312. For the period between September 1st, 1871, and March 1st, 1872, she has not been paid, although there is an appropriation for such purposes. I think the audit by the supervisors was sufficient, as the services for which the claim is made were rendered to the county. It is very doubtful whether the auditor or even the comptroller can now disallow the claim where no fraud or mistake is alleged. Although the relator was disabled by an accident from personally performing all the services, it appears they were performed for her by her daughter and others. No injustice will be done the county by payment for services which were in good faith thus rendered. The claim is, moreover, legal and just. A mandamus must issue for the payment of the claim; and to obviate any technical difficulty in the way of the comptroller, the auditor must be directed, also by mandamus, to audit the claim for the amount of the balance due the relator.

Perhaps such an order is necessary.

Motions granted.

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N. Y. SUPERIOR COURT.

GILBERT GILES agt. WILLIAM AUSTIN.

Equitable relief, in cases of penalties and forfeitures, is limited to such cases as admit of compensation, according to the original intent of the parties. In cases where the penalty or forfeiture is designed to secure the payment of a certain sum of money, a court of equity will afford relief on payment of the money secured, with interest.

As to the covenants in question contained in the lease, the principal end to be attained was the payment to the landlord of the rent reserved, and the discharge of the estate from the taxes and assessments which might be imposed during the term. The right of re-entry reserved to the landlord is the ultimate sanction operating to secure the performance of the tenant's obligations under the lease.

Special Term, March, 1873.

JOSEPH H. CHOATE, *for plaintiff.*

THOS. B. BROWNING, *for defendant.*

VAN VORST, *J.*—If this was a re-entry sought to be enforced on account of the non-payment of rent to the landlord, there would be no difficulty in determining whether equitable relief could be afforded the tenant, and he be relieved from the forfeitures occasioned by his breach of the covenants in the lease, as compensation could yet be made to the landlord by ordering the payment to him of the amount with interest, and by the imposition of such other terms as would be just and equitable. Although the obligation is in his favor, yet the taxes and assessments, which the tenant failed to meet, when due and payable, do not go directly to the landlord, but to the government. The omission to pay them at the time appointed subjects the land upon which they are a lien and burden to sale, and the landlord's title to jeopardy.

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Yet I cannot but conclude that when the taxes are actually paid by the tenant, whether at the time they became due or subsequently, the real object and intent of the parties, the discharge of the land from the lien, is substantially attained. Especially would this be so if no steps had been taken, during the period of default, for the sale of the land on account of their non-payment.

The object of the landlord in demanding this covenant from the tenant was to shift from himself, the *onus*, upon the tenant who was to occupy the land, these legal burdens. In view of this assumption by the tenant of the payment of taxes and assessments, the amount of rent to be paid by him was doubtless adjusted.

In the case of *Higgins* agt. *The Rector, etc., of Trinity Church* (48 N. Y., 532), it was held that the covenant of a tenant to pay taxes and assessments is an obligation in favor of the landlord which the latter might enforce by action, in which he might recover the amount of the taxes and assessments from the tenant, although he had not himself actually paid them.

The court says, "the covenant is broken when the defendant neglects to pay taxes and assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it and I will pay them. It is his own debt, made so by the terms of his covenant."

If this be so, and the obligation be a debt created by the tenant, there is no more difficulty in ascertaining the amount of compensation to be paid by the tenant, to be relieved from the legal consequences of his default, than if it was the result of a failure promptly to pay his rent.

The amount of taxes and assessments is definitely fixed and limited when imposed, and the time of their payment unalterably regulated by law, and the amount of interest to be paid in case of delay is also clearly established by authority.

If the landlord had himself paid these taxes and assessments, the amount he would be entitled to receive, as a con-

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dition to the tenant's relief (if redress was proper), could be accurately adjusted, and full compensation made him.

In the case of *Garner* agt. *Hannah* (6 *Duer*, 262), it was substantially held that the clause of re-entry, as applicable to covenants for the payment of rent or taxes or any other sum certain, is in equity treated as a security for the payment of moneys, and precise compensation can be made for their breach, and that a forfeiture for the non-payment of which is relievable in equity.

Such obligations possess elements of certainty and fixedness as to amounts and time of payment which generally apply neither to covenant to repair nor insure.

But it is claimed by the defendant that the conduct of the plaintiff has been such as to disentitle him to equitable relief. That his laches cannot be excused. That he has been willful in his default, and has exposed the reversion to danger.

These objections can be urged, to some extent, to all cases of default for non-payment of rent; but as a consequence the tenant must, if he would have equitable relief from a forfeiture, inevitably make compensation in damages.

I am not satisfied that the conduct of the plaintiff has been "willful" in such sense as to deprive him of equitable consideration and relief.

The plaintiff constitutionally and by habit depended upon others. The person to whom he intrusted the liquidation of those taxes, and to whom he gave the means for this purpose; neglected his duties. For years the plaintiff supposed the taxes and assessments had been paid, and when spoken to by defendant on the subject said they were paid.

There is nothing in the case which tends in the slightest degree to show that he ever denied his obligations under the lease, or that he sought to evade them. And when in November, 1868, his attention was definitely called to their non-payment, and when after examination he found them to be outstanding, he expressed his willingness and his intention to discharge these liens.

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Ignorant of the consequences of his default, he supposed the penalty which he would incur was the payment of increased interest. That the loss was on him alone. He was doubtless lulled into a mistaken feeling of security by the fact, as he was advised, that his landlord had allowed assessments, considerable in amount, to remain as a charge and lien upon the premises for many years without any apparent danger or hazard to the property.

I would by no adjudication give any license or encouragement to the neglect or willful postponement of legal obligations. The law demands that they should be promptly met.

But in the case of a person of slender capacity, as this plaintiff is shown to be, who through ignorance of the consequences of his default in promptly meeting his legal obligations, the binding force of which he does not willfully dispute, although he negligently postpones, and who blindly relies upon the mistaken advice of others, in whom he was justified in confiding, and when an adequate compensation for the default can be ascertained and made in money, the severe consequences of the default being the forfeiture of a considerable property, upon which he is greatly dependent, the benign principles of equity should interfere to shield him from the strictly legal consequences.

I cannot think but that this plaintiff should have relief if it can be made upon principles which ordinarily apply to cases of this nature.

But it is objected by the defendant that if the plaintiff is entitled to any relief he should have sought it in the ejectment suit; that this action is wholly unnecessary, and its commencement, under the circumstances, itself a breach of equity.

Such appears to have been the opinion of the learned chief justice when the case was before this court at general term, upon the appeal from the judgment entered upon the report of the referee granting the plaintiff relief from the forfeiture upon equitable terms.

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In the opinion delivered by the chief justice he says: "If he is entitled to any relief he may obtain it by proper answer in the ejectment suit itself;" and he further adds, "nor was it necessary for him to institute this action for the purpose of setting up the equities acquired by him by reason of the payment of taxes *pendente lite*. For if those payments operated as an equitable release and discharge of the term from the legal forfeiture which had been incurred, because of the previous failure of the tenant to perform his covenant, they would have constituted a perfect defense to the action of ejectment if duly set forth in a supplemental answer; and in that case certainly the defendant then would have been entitled, upon a proper motion, to an order permitting him to put in such an answer; and that the bringing of this action constitutes such breaches of the rules of equity and good conscience as deprive him of equitable relief in this suit."

The chief justice, for the reasons assigned by him, was in favor of a reversal of the judgment. Judge JONES concurred with the chief justice in a reversal of the judgment, and assigned, as reasons, that "the laches and action of the plaintiff have been such as not to entitle him to favorable consideration by a court of equity; and," he adds, "I am unwilling to make this case a precedent for granting relief under circumstances of such gross and inexcusable neglect." The judgment was accordingly reversed, and the plaintiff's complaint dismissed.

Judge MONELL, who was a member of the court before which the appeal was argued, did not concur in the reversal or dismissal, but was for affirmance.

The complaint having been dismissed without awarding a new trial, at a subsequent general term of the court, upon argument, the order reversing the judgment was so far modified as to award a new trial.

The new trial was granted upon affidavits made by the plaintiff and his counsel, setting forth the facts and circumstances under which this action was brought; showing that

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the plaintiff, in bringing the action, acted entirely upon the advice of his counsel, in whose opinion the action was necessary adequately to protect the rights of the plaintiff; that the plaintiff implicitly and confidingly followed the advice and adopted the course suggested to him by his counsel. It was the opinion of the counsel that the relief from the forfeitures, to which the plaintiff was equitably entitled, could more readily and with greater certainty be inquired into by an affirmative action, in which all the equitable rights of both parties could be ascertained and adjusted, than by motion in the ejectment suit for leave to file a supplemental answer or for a stay of proceedings upon the judgment, which motion it was claimed would be addressed to the discretion of the court.

The opinion of the chief justice is certainly entitled to great consideration; and had the reversal of the judgment upon the grounds urged by him been concurred in by judge JONES, I should feel bound to follow his views, unless they are in opposition to other adjudications of this court announced at general term.

But the subsequent general term did not decide, when ordering a new trial, that the remedies open to the defendant in the ejectment suit debarred him from bringing an affirmative action for equitable relief.

Judge CURTIS, in delivering the opinion of the court, says: "The tendency of the administration of justice is to relieve from forfeitures. Equity has always sought to mitigate the harshness and severity of the common law. The undenied statements on which this application is addressed to the court, the magnitude of the forfeiture attempted to be enforced, the importance of the interest at stake, the relative characters, capacities and intentions of the parties, and their respective claims to the equitable consideration of the court, are all matters that are presented in this application. If, as it appears to be, this case was in part decided at the general term adversely to the plaintiff upon a point not raised or

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discussed there, a question as to the equities of his mode of applying to the court for relief from the forfeitures, then it appears to me that he should have an opportunity of presenting the additional evidence of his good faith, and the equities of his position as urged by this application.

“When a suitor of slender capacity and advanced in years seeks to be released from a most onerous forfeiture, upon such terms as to the court may seem equitable and as it may impose, unless he has taken a position or performed acts depriving himself of all claim to equitable consideration, the court will be disposed to hear his application, and in all proper cases extend the relief prayed for upon suitable terms.

“The plaintiff sought relief by bill in equity instead of by motion to set up his equities by a supplemental answer, and as the question respecting the fairness and propriety of his course in this respect was not raised or discussed at the general term, but was presented in its decision as a prominent ground for debarring him of his relief, and as he now applies upon verified statements that are uncontradicted, alleging that upon a new trial he can show that he acted in good faith and fairness, and upon the advice of able counsel, and upon what they believed to be the settled practice of this court, it is but just and in accordance with equity that he should have such an opportunity by proofs and arguments to present his position and protect it from a new and undiscussed difficulty.”

Upon the new trial the plaintiff gave evidence upon the subjects embraced in the affidavits which were before the general term, and which were the foundation for the order granting a new trial.

This evidence shows conclusively that in bringing this suit the plaintiff acted in good faith, and upon the advice of able lawyers, his counsel, who, after due consideration, recommended this mode of procedure as the safest remedy to secure his equitable rights and best to determine the controversy between the parties, and in such manner as that the claims of each might be fairly adjusted; that in giving such advice the

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counsel for the plaintiff to a very considerable extent relied upon the opinion of this court announced in *Garner agt. Hannah* (6 *Duer*, 275).

Before adverting to the case of *Garner agt. Hannah* it may be proper at this point to consider the provisions of the Code affecting equitable relief to a defendant. Section 150 of the Code provides that a defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both.

Section 274 provides that the court "may grant to the defendant any affirmative relief to which he may be entitled."

The equitable claim of the plaintiff growing out of his payment of the taxes and assessments arose after his answer had been interposed in the ejectment suit, and if available could only have been set up by way of supplemental answer, permission to file and serve which is not a matter of absolute right, but to be obtained by motion addressed to the discretion of the court, which is to determine its sufficiency as a defense (*Morell agt. Garelli*, 16 *Abb.*, 269).

Relief may also be granted on a motion for a stay of proceedings after judgment. But it may well be urged that the ancient jurisdiction of a court of equity to relieve against a technical forfeiture is not divested by the provisions of the Code, above referred to, or by a remedy afforded through motion after judgment in a suit at law addressed to the discretion of the court. At common law, in an action of ejectment brought to recover the possession of land forfeited by the failure of a tenant to fulfill his covenant, relief might be had on motion after judgment (*Atkins agt. Chilson*, 11 *Metc.*, 112).

But that such remedy was accessible was no answer to a bill in chancery filed for affirmative equitable relief against the forfeiture. Either remedy could be adopted. In *Tibbs agt. Morris* (44 *Barb.*, 138), GROVER, J., held that a party was not bound to set up his equitable defense by answer, but

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could bring his action; and so jealous is the law for the conservation of the tenant's equitable rights against the enforcement of sanctions and penalties for his exclusion that it is provided by statute that within six months after execution upon a judgment in an ejectment suit he may commence an action for relief (*R. S.*, 5th ed., vol. 3, p. 830, § 7).

An earlier application before trial to stay the same and avoid its expense should be regarded with favor.

If the payment of the taxes and assessments by the tenant after forfeiture was no defense, as is claimed, section 150 could not aid him, as it provides only for setting forth of defenses, and it has been adjudged that the provisions of section 274 do not apply to cases of this character.

Garner agt. Hannah (6 *Duer*, 275) was decided at a general term of this court in 1857. I do not find that the authority of this case has been questioned. Chief justice BARBOUR does not allude to it in his opinion.

That was an action of ejectment. The plaintiff claimed to recover the possession of land under a clause of a re-entry in the lease on account of the tenant's failure to pay the taxes and assessments. Before bringing his action the landlord himself paid the liens left outstanding through the tenant's default. After the commencement of the action the defendant tendered the taxes to the landlord, which were refused. On the trial the defendant moved for leave to amend his answer by setting up his offer and the refusal, or to file a supplemental answer, which was denied, and a verdict was directed for the plaintiff, subject to the opinion of the court.

The court in its opinion at general term decided that if the facts had been set up in a supplemental answer they would have constituted no defense to the action. It was also decided that the defendant lost nothing for want of a supplemental answer, as the facts out of which his equity arose had been proven on the trial, and their sufficiency as a defense could be passed upon as well as though they had been pleaded. In alluding to the affirmative relief which might

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be granted to a defendant under section 274, the court says it is limited to "such relief as may properly be given within the issues made by the pleadings, or according to the legal or equitable rights of the parties as established by the evidence, not to that redress which is equally applicable after as before judgment and may be obtained on motion *or by action*." In rendering the judgment the court says: "We think the judge properly refused to allow the motion made at the trial. Judgment must be for the plaintiff, with liberty to the defendant to apply to the court for such relief against it as he may be entitled to, and without prejudice to his right *to bring an action* for such relief if he deems the latter the proper course."

This authority would seem clearly to justify the plaintiff's counsel in advising the commencement of this action, and sustains its propriety.

And it may not be improper to add that the defendant, instead of answering, might have demurred to the complaint, by which the appropriateness of this remedy could have been speedily determined on an issue of law, and that he consented to the injunction issued in this action, when on the order to show cause he might have successfully opposed its continuance if improperly granted. This conduct on his part would seem to afford reasonable ground to believe that the defendant was not wholly unwilling that his action at law should be stayed, nor to trust his rights and equities to the determination of this action.

From the most careful consideration which I have been able to give this subject, I am of opinion that this action is maintainable, and that it was fairly and in good faith brought, and that it is clearly the interests of both parties that their rights and claims now and here should be justly determined.

The case shows that the plaintiff is entitled to relief from the forfeiture under which he is resting, and to be reinstated in his rights under the lease upon making proper compensation to the defendant.

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· Upon the trial the defendant stated in substance that he had never been and was not now unwilling that the plaintiff should be relieved, but insisted that his own equitable claims should be considered in determining the terms of the redress.

But in asking, as he does, that the plaintiff shall be adjudged to pay him, in addition to the rent which had been paid him in currency from the date of the lease to the 1st day of November, 1867, the difference between gold and currency for that whole period, and should also pay the rent which has accrued since that time, and to the end of the term, in gold, the defendant demands more than a court of equity should or could properly grant.

The provision for a re-entry and the rights of the defendant thereunder are not independent; they exist in defendant's favor only to secure the performance of the obligations of the plaintiff created by the covenants in the lease, and in the manner and by the means therein expressed.

The legal right of re-entry cannot be used to exact from the plaintiff concessions, in the way of payment of money, other than fairly arise from his original engagement, or to place him under a new and more onerous contract.

I can conceive of no sound basis upon which the defendant can equitably claim that the plaintiff should advance to him, either for the past or future, the difference between currency and gold; such claim has no relation to the plaintiff's covenants, and if yielded would make a demand so great in amount, as that the remainder of the term would be of little profit to the plaintiff.

This being a proper case, the plaintiff should have redress in this action upon the usual terms. He has since the forfeiture and the commencement of the ejectment suit discharged all the liens by way of tax and assessment, except those for the years 1866, 1867, 1868, on the lot on Manhattan alley 1162. He had good reason to suppose that in paying the amount charged upon lots 1196 and 1162, grouped and appearing to be valued together on Reade street, he had

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discharged the tax on the Manhattan alley lot, and it may be that the taxes on lot 1162 are in fact paid. But the evidence is not sufficient to satisfy me beyond doubt that this is so. In no event can the judgment in this action affect the question; it can neither take away or create a lien or obligation under the apparent assessment.

The liens, however, appear of record, and have been the foundation for proceedings to sell the land. The plaintiff should remove by payment or redemption these taxes and relieve the land from their effect. The hazard of their remaining should not rest upon the landlord. If their payment should afterward appear to be illegal he has his remedy for a recovery back of the money from the city.

The rent since the forfeiture, which, up to the time of payment of the same into court, had been tendered to the defendant and refused, should be paid to the defendant with legal interest up to the time of the deposit. The plaintiff should also pay the costs, disbursements and allowances of the defendant in the ejectment suit and in this action, and also the costs of the other defendant in the ejectment suit. I had some question as to whether the defendant should be allowed the costs of this action subsequent to the judgment entered upon the report of the referee, which made full compensation to the defendants for the legitimate consequences of the plaintiff's default, and upon the grounds that subsequent resistance should have been at defendant's expense, unless a more favorable result to him was obtained. But as that judgment was reversed by the general term, the defendant appears to have been legally justified in his appeal, and should recover these costs. The findings to be filed herein will state the terms of the relief and the extent thereof, and the manner and time in which to be performed and enforced with greater precision.

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N. Y. SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. CHARLES H.
MALLORY AND OTHERS.

The *Department of Docks* in the city of New York have no authority to allow persons to build sheds or other buildings for the protection of freight or for any other purpose, on the piers or wharves of the city.

The only power conferred upon the Department of Docks in reference to wharves, piers and slips being that which had been conferred by acts of the legislature or by charter upon the corporation of the city of New York, and its officers connected therewith, and others in relation thereto, and none of them contained the general power to erect or permit the erection of any such incumbrances.

THIS action was commenced by the attorney-general for a perpetual injunction, restraining the defendants, Charles H. Mallory & Co., from erecting a shed over pier No. 20, East river, under a permit from the Dock Department, of which the following is a copy :

	CITY OF NEW YORK, DEPARTMENT OF DOCKS, }
[E Seal. c. 1,360.]	346 and 348 Broadway. }
No. 189.	NEW YORK, <i>August</i> 19, 1873. }

We, the undersigned, Commissioners of the Department of Docks, hereby permit C. H. Mallory & Co., during the pleasure of the board, and in conformity with its rules and regulations, to *erect* on *pier* 20, *East river*, a *shed* for the protection of freight, in accordance with *resolution* adopted at meeting of the *Board of Docks*, held *July* 3d, 1873. The dimensions of said *shed* being as follows: 400 *feet* or more

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long, thirty-nine feet wide, and eighteen to nineteen feet high.

JACOB A. WESTERVELT,
WM. GARDNER,
W. BUDD,
Commissioners.

On the complaint and accompanying affidavit a preliminary injunction was granted by judge FANCHER, and an order requiring the defendants to show cause why it should not be continued.

The motion to continue the injunction was argued before judge INGRAHAM, and an order made by him, September 22d, 1873, denying the motion and dissolving the injunction.

The concluding paragraph of judge INGRAHAM's opinion was as follows:

“While the above views render it proper to dissolve the injunction, I think proper to add that, if the plaintiff proposes an appeal to the general term it would not be advisable to proceed with the erection of these sheds until such appeal is decided. That court will very soon be in session and the case then heard.”

Messrs. C. H. Mallory & Co. proceeded to cover the pier with a shed, pursuant to the permit, and completed the work shortly after the dissolution of the injunction.

An appeal was taken on behalf of the people from the order dissolving the injunction to the general term.

The appeal was argued at the general term, held in October last, before justices BRADY and FANCHER, by William Allen Butler for the people, appellants, and Stephen P. Nash for the defendants, respondents.

On December 29th, 1873, the court announced its decision, reversing the order, with costs.

BRADY, J.—The injunction granted in this case was dissolved by presiding justice INGRAHAM, upon a construction

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of the statute passed in 1871, by which he thought the department of docks was invested with power to permit the erection of such a structure as the defendants in this case desired to create. He concedes that prior to that statute, amending, as it did, one passed in 1870, there was no authority for such an erection, the courts having pronounced against them, and the legislature having expressly prohibited their construction.

The question presented *in limine*, is, therefore whether this view of the statute of 1871 must be sustained. The acts of the legislature in reference to wharves and piers have, either directly or impliedly, prohibited incumbrances upon them (*See Colonial Statute, January, 1770, Van Schaack, 563; 1 act of 1784; Jones agt. Varick, 125, 126 [which is substantially a re-enactment of the Colonial Statute]; act of 1791, March 10, 2 Greenleaf, 354; Revised Laws, 1813, chap. 86, §§ 227, 233, 234, 235; act of 1857, laws, vol. 2, 487; act of 1858, laws, chap. 226, p. 363*). All these are expressions of the legislative intent that the wharves and piers should not be incumbered, the design being to give to and preserve for them the character of highways—to make them part of the public streets. The act of 1813, section 227, as stated by justice INGRAHAM, provided that no building of any kind or description whatsoever, other than piers and bridges, should at any time thereafter be erected upon the streets or wharves, or between them and the river to which they should adjoin and front, and the act of 1858 empowered the commissioners of pilots to direct the removal of all structures affixed to the wharves. These acts were in force at the time of the passage of the acts of 1870 and 1871, and the court below was clearly right, therefore, in declaring that they had not been repealed; and that, unless the act of 1871 gave the power to permit incumbrances, it did not exist.

The learned justice in the court below placed his decision on this subject upon the existing statutes referred to, and the judgments of the court of last resort, establishing the proposi-

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tions that a wharf was a public street or highway (*Taylor* agt. *Atlantic M. Ins. Co.*, 37 *N. Y.*, 275), and that such a structure as the one contemplated was an incumbrance and unauthorized (*Comrs. of Pilots* agt. *Clark*, 33 *N. Y.*, 251). In consideration of the question stated, therefore, we start with the conclusion that when the acts of 1870 and 1871 were passed, there was no authority residing anywhere having the power to permit such an erection, the legislature and the courts of law having pronounced against their legality. What, therefore, was the design of the acts of 1870 and 1871? What did the legislature intend to accomplish? It is not very difficult to answer this question.

The object was to place under the control of a department, specially created therefor, the construction and regulation of the wharves, piers and slips of this city, to the same extent that such control had been given to the corporation; in other words, to transfer to it the powers possessed by the corporation, its officers and others, and such powers only.

There is not in the provisions of the act of 1871 anything which, properly interpreted, confers upon the department any other or larger authority. The statute of 1871, laws, page 1235, amendatory of the act of 1870, upon which this appeal depends, provides that the department of docks shall have exclusive charge and control of all the wharves, piers, bulk-heads and structures thereon, and of the appurtenances, easements, uses, reversions and rights belonging thereto, which were owned or possessed by the corporation, or which it might acquire.

The language, as remarked by the court below, is very comprehensive; but it is only so for the gift of the powers really conferred, and which, as already suggested, are those which the corporation formerly possessed.

The conclusion of the section (2) provides, and this is a key to the extent of the act: "The duties and powers heretofore performed and exercised by any officer, department or bureau of said corporation, in and about all or any part of said pro-

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perty, are hereby conveyed to and vested exclusively in the said department."

The position assumed by the court below is that the control of the piers and bulk-heads, with the structures thereon, and the authority to repair, build and rebuild such property, was amply sufficient, not only to cover the wharves where structures were then erected, but to empower the department to grant permission to build others of a similar character, and that the legislature intended to invest the department with discretionary power thereto.

The word "structures" seems to have had a controlling influence; but it is submitted, with great respect, that the act related only to the legal structures, and to no other.

It cannot be said that the legislature intended, by the mere use of a word in proper connection with a subject expressed and legislated upon, to legalize what was prohibited, and against which the courts had pronounced their judgments. The use of that word implies equally the power to remove them, which had been conferred upon the commissioners of pilots by the act of 1858, *supra*; and this view is in harmony with the design of the legislature to vest in the department all the powers theretofore conferred in reference to the construction, control and regulation of wharves, piers and slips. The legislature was acting upon the subject of wharves, piers and slips, with the design of centralizing the powers in reference to them, and must be supposed to have done so with regard to existing statutes and laws otherwise declared, intending to embrace, for that purpose, all matters legally within the legitimate sphere of the subject, and necessary to establish the jurisdiction. The use of the word mentioned cannot, without doing violence to established principles, be regarded as a repeal of the existing acts of the legislature, or as legislative declaration that the law administered by the court of last resort was to be changed; and yet, to give it the significance it has received, such a result must follow.

It is well settled that repeals of acts of the legislature by

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implication are not favored, and not allowed, save when their repugnancy and inconsistency are plain and unavoidable.

The earlier statute remains in force, if not repugnant or inconsistent, unless the latter takes some notice of the former, plainly indicating an intention to abrogate it (*The People agt. Denning*, 1 *Hilt.*, 271; *Bowen agt. Dease*, 5 *Hill*, 225). All acts *in pari materia* should be taken together as if one law (*People agt. Denning*, and cases cited).

These acts may remain and are not inconsistent. The department of docks may exercise power over structures on the piers legally existing, if any, when the act was passed; such, for example, as suitable derricks, authorized by the act of 1867, laws, volume 2, page 2382, for unloading canal boats and barges, and over those not legal until their removal is demanded or required by virtue of the act of 1858, or upon the ground that they are incumbrances and subject to removal. It has been said, and justly, that a construction which repeals another statute should be very clear, when the repeal is of a part of a statute and seriously mars the harmony of a system (*Hayes agt. Symonds*, 9 *Barb.*, 260); and the same remark applies where the alleged repeal is of one of several statutes relating to the same subject, and seriously affects the whole system evolved. It is also a principle in the interpretation of a statute that it should not be construed to work a mischief, *e. g.*, curtailing a right of way of a navigable river or interfering with a highway, unless required by words of the most explicit and unequivocal import (*Sprague agt. Birdsall*, 2 *Cow.*, 419; *People agt. Lambert*, 5 *Den.*, 9). And so in this case, the mischief of allowing a department a discretion to incumber a public highway or street should not be sanctioned unless required by express words.

The exclusive use of a pier or wharf given to any particular class of vessels must be understood to be for the purposes of navigation or commerce only, and subject to the right of the public to the use of the surface as a public street or highway. The exclusive use, assuming the power to grant it, does not

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necessarily confer the absolute control of the pier for a particular purpose.

It has been held that the common council cannot contract away its legislative power. It can make no contract which restricts its legislative authority over the particular subject embraced in the contract. If, therefore, a grant or lease were made by the common council, assuming them to be properly authorized to do so, of the exclusive use of a pier for the purposes of commerce, it would mean such use only, and not necessarily grant or convey such absolute power or authority over the pier as to exclude the public in their enjoyment of it as a highway or public street.

It was said on the argument that the use of the pier for the defendants' vessels was a devotion of it to commerce, and therefore to a public use and for the public convenience and benefit.

To this it may be said, in the language of chief justice DENIO, in *Commissioners of Pilots agt. Clark (supra)*: "The language and obvious policy of the statute is that these piers and bulk-heads should be kept clear of incumbrances, and it will not answer for parties permanently to engross portions of their area, and then ask a jury to speculate upon the degree of inconvenience which the public would suffer, and whether it was not fairly balanced by the advantage of the structure which constituted the incumbrance." In addition to these observations it may be said with great force that as long as the wharves are held to be parts of the public streets or highways they must be used accordingly, and therefore, with reference to well established public rights, subject only to such difference as the ordinary incidents of commerce may render necessary and justify.

Having arrived at these conclusions, it is not necessary to consider whether the legislature, by virtue of an inherent power over the navigable waters of the state, may grant authority to incumber the public highway in the manner designed by the defendants. It is not necessary, because it

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seems that they have not delegated any such authority; the construction adopted of the act of 1871 being that it conferred upon the department of docks only the authority, in reference to and power over the wharves, piers and slips, which had been conferred by acts of the legislature or by charter upon the corporation, and its officers connected therewith, and others in relation thereto, and that none of them contained the general power to erect or permit the erection of an incumbrance upon any wharf or pier such as contemplated by the defendant. The order made at special term should therefore be reversed.

Ordered accordingly.

Halstead agt. Swartz.

SUPREME COURT.

JAMES C. HALSTEAD, respondent, agt. JACOB SWARTZ,
appellant.

When default is made in the payment of the debt which a chattel mortgage is given to secure, the *title* to the mortgaged property becomes, *eo instanti*, absolute in the mortgagee.

The only right that remains to the mortgagor, after such default, is that of redemption; and this right may be barred by a sale of the property at public auction or private sale, without notice.

If the debt is payable in *installments* and default is made in the payment of one installment only, the title of the mortgagee is as perfect as if default was made in payment of the whole debt.

To entitle the mortgagor to *redeem* under such a mortgage he must pay or tender the whole debt. The whole title vests on default, and the whole title must be divested by the redemption; and that can only be done on payment of the whole debt.

In an action of *trover* the plaintiff is entitled to recover the value of the property, as of the time of the sale made by the mortgagee, and for the loss of the use prior thereto; but he is not entitled to the value of the use subsequently.

General Term, Fourth Department, October, 1873.

Before MULLIN, P. J., TALCOTT and E. D. SMITH, JJ.

ON the 10th of May, 1869, the appellant sold to the respondent the canal-boat, "Caddie Roberts," for \$1,000, payable as follows: One hundred dollars on the 1st day of September, 1869; \$100 on the 1st day of October, 1869; \$100 on the first of November and \$100 on the first of December of the same year, and the residue in six monthly payments, commencing on the 1st day of June, 1870.

Notes were given for these sums, payable as above stated; and to secure these notes the respondent gave to the appellant

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a mortgage on said canal-boat and other property, conditioned that if said respondent should pay said notes as they became due the mortgage should be of no effect; but that in case of the non-payment of said notes at the time or times above mentioned, then said appellant should have power to seize and sell said boat, and out of the avails, after paying the expenses of the sale and the keeping of said property, to pay said debt. Said mortgage was duly filed in the office of the auditor of the canal department.

The note of \$100, payable on the 4th day of September, 1869, was not paid when it became due, but the respondent made default in the payment thereof.

On the eighteenth day of the same month the appellant seized said boat by virtue of said mortgage, and in the forenoon of the same day directed the sale of said boat under the mortgage, and the same was sold at private sale to one Frank for \$600. No money was paid or papers passed; and on the same or on the next day Frank relinquished or resold his bid on the boat to the appellant on condition that he would "treat the boys," which was done.

The sale under the mortgage was made without notice to the respondent and without public notice. The referee found that said sale was fraudulent and in derogation of the rights of the respondent.

On the 20th day of September, 1869, the respondent tendered to the appellant \$104 and demanded possession of said boat, which tender and demand were refused by the appellant.

The respondent was permitted by the referee, notwithstanding the objection of appellant's counsel, to prove the value of the use of said boat for two months and twenty days in 1869, and for eight months in 1870.

The referee charged the respondent for such sums, and \$1,500 for the value of the boat, amounting in all to the sum of \$2,000. From this sum he deducted the amount due on the mortgage and interest, amounting to the sum of \$1,244.42,

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and for a certified copy of the chattel mortgage one dollar and twenty-five cents, making in all \$1,245.67; and he ordered judgment for the balance of \$754.33, besides costs, and from this judgment the appeal is brought.

I. N. MESSENGER, *attorney for appellant.*

FULLER, VANN & BROOKS, *attorneys for respondent.*

By the Court, MULLIN, P. J.—On default being made in the payment of the debt which a chattel mortgage is given to secure, the mortgagee's title to the mortgaged property becomes, *eo instanti*, absolute at law (*Falman agt. Smith*, 39 *Barb.*, 390; *Butler agt. Miller*, 1 *N. Y.*, 496; *Fay agt. Burnes*, 12 *Barb.*, 677; *Brown agt. Bement*, 8 *J. R.*, 96; *Patchin agt. Pierce*, 12 *Wend.*, 61). The only right that remains to the mortgagor, after default in payment, is that of redemption, and this right may be barred by a sale of the property at public auction or private sale, without notice (*Ballou agt. Cunningham*, 60 *Barb.*, 425; *Chamberlain agt. Mortin*, 48 *Barb.*, 607).

The title of the mortgagee is as perfect when the default is in the payment of an installment of the debt, when it is payable in installments, as it is upon default in payment of the whole debt (*Robinson agt. Wilcox*, 2 *N. Y. Legal Obs.*, 160).

This result necessarily follows from the condition of the mortgage. The title cannot become vested in parcels; it becomes absolute at once or not at all.

To entitle the mortgagor to redeem under such a mortgage he must pay or tender the whole debt (4 *Kent*, 162, 163, 164; *Polls agt. Lord Clinton*, 12 *Ves.*, 48-59; *Patchin agt. Pierce*, 12 *W.*, 61). In the case last cited the plaintiff sued in trespass for taking certain personal property which he had mortgaged to one Hickok to secure payment of fifty dollars by the twentieth October following its date. Partial payments were made, but the whole debt was not paid. The assignee of the mortgage seized the property, and the court

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held that the taking was lawful. Payment after the debt came due did not revest the property in the mortgagor.

The authorities cited do not hold in terms that the whole debt must be paid when an installment of the indebtedness only has become due; but they do hold that if there are several parties interested in the debt the whole debt must be paid or tendered, and that the mortgagor or other party cannot redeem on paying part only of the debt. Authority is not necessary, it seems to me, in support of a proposition resulting so manifestly from the very nature of the interest that the law confers on the mortgagee of chattels on breach of the condition.

The whole title vests and the whole title must be divested by the redemption, and that can only be done on payment of the whole debt.

It is immaterial therefore whether the sale by the mortgagee on the 18th September, 1869, was fraudulent or fair; the title to the boat remained in him, and the mortgagor has not redeemed.

Unless the tender of the \$104 was sufficient, no reason is perceived why the sale in October, 1869, to Horley & Doran did not bar the plaintiff's right to redeem. No fraud is pretended as to that sale, and the right to sell was as perfect then as in the September preceding. If, however, the sale to Horley & Doran had no other effect, it prevents a redemption, as it puts it out of defendant's power to deliver the boat (*Stoddard agt. Dennison*, 38 *How.*, 296-306).

The plaintiff did not attempt to redeem; he treated the tender as revesting in him the title to the property; this it could not do; a decree of a court of equity only could revest the title. It is held, in *Kortright agt. Cady* (21 *N. Y.*, 343), that payment or tender of the amount due on a real estate mortgage terminated its lien on the land, although not paid or tendered on the law day. But the title of the mortgagee of land does not become absolute on default of payment as it does in case of a chattel mortgage, and the case of *Patchin*

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agt. *Pierce (supra)* holds that payment after the day does not discharge the lien.

In an action of trover the plaintiff is entitled to recover the value of the boat as of the time of that sale, and for the loss of the use prior thereto; but he is not entitled to the value of the use for the season of 1870.

It was his duty to bring his action promptly. If he could wait a year, no reason is perceived why he might not wait two or three years and recover for the use of the boat a sum much greater than her value; as it is, the referee has, by his judgment, taken from the defendant his boat and given it to the plaintiff, without one penny of compensation, and brought him in debt more than \$750.

The judgment must be reversed and new trial ordered before another referee, costs to abide the event.

Carrere agt. Spofford.

N. Y. SUPERIOR COURT.

MAYNARD E. CARRERE agt. PAUL N. SPOFFORD and others,
Executors, &c.

All actions brought in respect of any contract entered into by or on behalf of a *copartnership firm*, before the death of a partner, must be brought by or against the surviving members of the firm alone. The representatives of the deceased partner cannot sue or be sued in respect of such contract.

Not only the remedies but the rights and liabilities of the partnership vest in and are imposed upon the *surviving partner*.

The joint debt may, by reason of the death of a partner, be treated as if originally a separate debt of the surviving partner.

Special Term, September, 1873.

DEMURRER to amended complaint.

VAN VORST, *J.*—Upon the death of a partner all that passes to his representatives is his proportion of the assets after they have all been converted into money, and all the debts and liabilities have been paid. The surviving partner has exclusive right in virtue of his title, and upon him is cast the duty of closing up the partnership affairs. All actions brought in respect of any contract entered into by or on behalf of the firm, before the death of a partner, must be brought by or against the surviving members of the firm alone. The representatives of the deceased cannot sue or be sued in respect of such contract.

Parsons, in his *Treatise on the Law of Partnership*, section 447, says: "The executors or administrators of the last survivor sue alone, without joining the representatives of the first or any later deceased." And Lindley, in his work on the same subject, third edition, volume 1, page 505, says the legal

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representative of the surviving partner is the proper person to sue and be sued at law in respect of the engagements of the firm.

No one of the cases cited by these learned writers is an illustration of the rule as laid down by them in this particular regard as to the person to sue or be sued upon partnership obligations, on the happening of the ultimate contingencies above contemplated; and yet such rule would seem to be a corollary from principles long settled with regard to the nature of the partnership and the right and interest of the partner, and the vesting of the title to the property on the death of a partner.

Not only the remedies but the rights and liabilities of the partnership vest in and are imposed upon the surviving partner. In *Davis agt. Clarke* (1 W. & S.), it is said: "The action of the surviving partner is his own." In *Yale agt. Eames* (1 Metcalf, 486), it is said: "If one partner die the whole legal title vests by survivorship in the other;" and in like manner as to liabilities. Each partner is liable to pay the whole debt, and contribution lies entirely among themselves.

In *Rice agt. Shute* (2 Burr, 2613), lord MANSFIELD said: "All contracts with partners are joint and several; every partner is liable to pay the whole debt." And in *Richards agt. Heath* (1 B. & Ald., 29), it was held that a plaintiff, in an action charging the defendant in his own right, might recover a demand due from the defendant individually, and another due from him as surviving partner. The joint debt may, by reason of the death of a partner, be treated as if originally a separate debt of the surviving partner.

I have considered the analogy drawn by the learned counsel for the defendants from the condition of a trust estate upon the death of the surviving trustee of an express trust. Under our statute such trust estate does not descend to the heirs, nor does it pass to the personal representatives of the survivor; but if the trust be unexecuted, it shall vest in the supreme court. A surviving partner, it is true, is a trustee

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for all concerned in the copartnership for the representatives of the deceased and the creditors of the firm; but it is a trust to wind up the affairs with fidelity and without unnecessary delay. Still he is more than trustee; he is, in his own right, principally interested in and possesses in himself the title to the property and assets as surviving owner; and it is because of such legal right in himself that he becomes a trustee for the creditors and legal representative of his deceased partner.

This action was originally brought against Paul Spofford, the survivor of the late firm of Spofford & Tilleston, to secure an accounting from the defendant, as such surviving partner, of moneys which the firm had received as agents of certain steamships in which plaintiff was a part owner and to which he claimed to be entitled.

During the pendency of the action Paul Spofford, the surviving partner, died, leaving the defendants herein his executors, into whose hands as such executors, as is alleged in the supplemental complaint, assets have come.

The executors were brought in as sole defendants in the place of Paul Spofford, deceased, by way of supplemental complaint.

In the supplemental complaint the defendants have demurred, stating, as their sole ground of demurrer, that the supplemental complaint does not state facts sufficient to constitute a cause of action.

In view of the principles above recognized the defendants, into whose hands the assets and property of the surviving partner have come, and that lawfully, are solely liable to account in this action for this copartnership liability and obligation to the plaintiffs.

The demurer should be overruled, with liberty to defendants to answer on the usual terms.

Magnin agt. Dinsmore.

N. Y. SUPERIOR COURT.

ELISE MAGNIN agt. WILLIAM B. DINSMORE, President, &c.

Under the provisions of section 385 of the Code where a verdict obtained is not more favorable than an offer previously made by defendant, the costs accruing after the offer are to be taxed in favor of the defendant, the plaintiff's costs being confined to the time prior to the offer.

Special Term, December, 1873.

APPEAL from taxation of costs.

Plaintiff, upon the trial, had a verdict for eighty-seven dollars and forty cents, which was not more favorable than the one which the defendant had previously offered under section 385 of the Code to allow to be taken. The justice presiding at the trial therefore directed that the defendant recover all costs subsequent to the offer. Upon the taxation of these costs by the clerk, plaintiff claimed to be entitled to costs up to the time of the offer. The claim was allowed and defendant appealed.

FREEDMAN, J.—In section 385 of the Code, as amended by chapter 479 of the Laws of 1851, page 903, the words, “and if the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay the defendant’s costs,” are separated from the words, “from the time of the offer,” by a comma, thus showing clearly that it was the intention of the legislature, which then, for the first time, enacted the prohibition of plaintiff’s recovery of costs in the cases contemplated by said section, to enact that such prohibition should run from the time of defendant’s offer, and should not relate back as a penalty to the time of the commencement of the

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action. In *Burnett agt. Westfall* (15 *How.*, 430) the same construction was adopted, notwithstanding the court failed to notice the existence of the comma above referred to.

It is true that the language of the section has been again amended, in respects not necessary to be noticed here, by chapter 824 of the Laws of 1866 (*vol.* 2, *p.* 1845), and that in the amendment, as published, the said comma has been omitted. But in view of the construction adopted by the supreme court, in *Burnett agt. Westfall*, of which the legislature of 1866 must be presumed to have been cognizant, this bare omission does not *per se* demand a different construction; and as the one previously adopted is the more equitable one, it should be retained.

The plaintiff having recovered a judgment for more than fifty dollars is the prevailing party; and as such he is entitled to costs under section 303. Under section 304 such costs are allowed to her, of course; but under the operation of section 385 they are to be confined to the time prior to the offer, and all costs which accrued subsequently are to be taxed in favor of the defendant. The costs to be taxed on either side include, as a matter of course, the necessary disbursements.

The taxation should be affirmed.

Page agt. McDonnell.

COURT OF APPEALS.

J. AUGUSTUS PAGE, appellant, agt. PATRICK McDONNELL,
respondent.

Where a seller of real estate tenders a deed to the purchaser and demands payment of the balance of the purchase-money, in pursuance of the terms of a written contract between them, the refusal of the purchaser to accept the deed and pay such money upon grounds not tenable, puts it in the power of the seller to put an end to the contract; and when this is done, the purchaser can neither enforce specific performance of the contract, nor recover back the portion of the purchase-money which he has paid. (*This case at general term is reported, ante, page 52.*)

January, 1874.

Mr. C. GOEPP, *for appellant.*

Mr. COLES MORRIS, *for respondent.*

GROVER, *J.*—On the 24th of November, 1868, the parties entered into a contract under seal, by which the defendant agreed to sell and convey to the plaintiff, who thereby agreed to purchase, certain premises in the city of New York therein specified, for the sum of \$49,000; \$2,000 to be paid upon the execution of the contract, which was then paid; \$33,000 payable upon the delivery of a deed of the premises, and \$14,000, being the amount of a mortgage then upon the premises, which the plaintiff agreed to pay. The contract provided that the plaintiff should pay interest upon the unpaid purchase-money from its date, and that he should receive the rents of the premises from the same time. The defendant covenanted to convey the premises by warranty deed containing the usual full covenants in fee simple, free from all incumbrances except as above, which deed was to be

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delivered on the 10th day of February, 1869, at the office of Bemmer & Hows, No. 175 Broadway, between the hours of one and two in the afternoon. The defendant attended at the time and place specified for the delivery of the deed with one prepared for delivery, but the plaintiff failed to be there. After the expiration of the time specified for the delivery of the deed, the defendant left the place, and the defendant, Mr. McDonnell, met the plaintiff and tendered him the deed. The plaintiff said it was not right, as there was an assessment, for extending Church street, not paid. This objection was well founded, as there was a small assessment for that purpose, which was an existing lien upon the property. Upon the morning of the next day, McDonnell paid this assessment, procured a receipt therefor, went to the office of the plaintiff and then tendered him the deed, together with the receipt showing the payment of the assessment. The plaintiff refused to receive the deed upon the ground that the premises were incumbered by leases to various tenants, all of which would terminate on the first of May thereafter, and declared himself ready and willing to complete the purchase if these incumbrances were removed. The defendant told the plaintiff he must accept the deed and complete the purchase, or he would put an end to the contract. The defendant proved that these leases were existing at the time of making the contract, and that the property was then held under them by the respective tenants and that these facts were then known to the plaintiff. The latter excepted to the competency of this proof. As the contract provided that the plaintiff should receive the rent of the premises from the time of entering into it, this proof was competent to show what was the rent intended by the parties. It showed clearly that this was the rent reserved upon the existing leases (*Bridger agt. Pierson*, 45 *N. Y.*, 601). By the contract the plaintiff was entitled to this rent down to the time of receiving the deed. The leases must, therefore, be continued until that time. The defendant, under the contract, had no right

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to procure their determination before the delivery of the deed. This shows that the plaintiff was to take title subject to these leases as well as to the mortgages, the payment of which he had assumed. The defendant agreed to convey the premises in fee simple, except as above. This was an exception of the leases and mortgages. It follows that the existence of the leases furnished no excuse to the plaintiff for the non-completion of the purchase. The defendant then told him that unless he then completed it, he should put an end to the contract. This required prompt action by the plaintiff if he desired its performance. His delay of more than two months from this time before doing anything towards performance, puts an end to his right to specific performance.

The plaintiff further claims that if not entitled to specific performance, he is entitled to judgment for the money he had paid upon the contract. But the defendant was ready and willing, and tendered full performance on his part. The plaintiff neglected and refused to perform on his part, for which reason the contract was terminated by the defendant. Under these facts the plaintiff is not entitled to recover the money he had paid thereon (*Haynes* agt. *Hart*, 42 *Barb.*, 58; *Battle* agt. *Rochester City Bank*, 3 *N. Y.*, 88; *Green* agt. *Green*, 9 *Cow.*, 46; *Ketchum* agt. *Evertsen*, 13 *Johns.*, 359).

The judgment appealed from must be affirmed, with costs. GROVER, J., reads for affirmance; all concur.

Brown agt. Green.

SUPREME COURT.

IN THE MATTER OF MARTIN B. BROWN agt. ANDREW H. GREEN, Comptroller, &c.

The audit and allowance by the board of supervisors of the county of New York of a *claim* against the county, is conclusive of the right of the claimant to recover it, subject only to the examination and allowance of his *vouchers* by the auditor and the approval of the comptroller thereupon.

The power to examine, settle and allow *accounts* is one thing; this belongs to the board of supervisors. And the power to examine, allow and approve *vouchers* is another thing; this belongs to the auditor and comptroller. (*The case of People ex rel. Ellis agt. Flagg*, 15 *How.*, 553, *explained.*)

First Department, New York General Term, November, 1873.

Before INGRAHAM, P. J., BRADY and FANCHER, JJ.

APPEAL from an order of special term in proceedings for mandamus.

BRADY, J.—The case of *The People ex rel. Ellis agt. Flagg* (15 *How. Pr. Rep.*, 553), relied upon by the respondent, does not sufficiently maintain the proposition that, under the statute of 1870, chapter 190, Laws of 1870, the comptroller has a revisory power over, or concurrent power with, the board of supervisors in auditing and allowing claims against the county. It is true that the statute therein considered is identically the same as that of 1870, but that adjudication must be regarded as intended to apply to the facts disclosed only. The claim presented in that case was allowed by the supervisors, and the comptroller directed to pay it. It was never, or, as the report of the case states, the bill was never examined or delivered by the auditor of the finance depart-

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ment, and the comptroller refused to draw his warrant as directed. The mandamus applied for was to compel him to pay. The act of 1857, considered and applied in that proceeding, provides (*Laws 1857, chap. 590, § 6*) "that all moneys drawn from the treasury by authority of the board of supervisors shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor and approved by the comptroller." The right of the relator to payment depended, therefore, upon the examination and allowance contemplated; that is, the examination and allowance of the vouchers by the auditor and the approval of the comptroller. The bill, that is, the voucher, had never been examined or allowed by the auditor, and it is clear that the relator was not entitled to the remedy which he sought to obtain. It was his duty to request the examination and allowance of the vouchers presented, and the approval of the comptroller thereupon, and if any of the ministerial acts required were not performed, his remedy was to compel its performance by mandamus. The court was, under the circumstances, quite justified in saying: "It is, therefore, too clear to admit of controversy that since the act of 1857 an audit and allowance by the board of supervisors is not sufficient to authorize the payment of any money out of the treasury;" but the further suggestion, which seems to be that the claim must be examined and allowed by the auditor and approved by the comptroller, was neither necessary to the decision of the appeal nor warranted by the law of the land. The learned justice who delivered the opinion in that case does not say that the claim must be examined and allowed, but says: "To comply with the mandate of this law, in addition to such audit and allowance by the board, the same must be examined and allowed by the auditor; and, as a further check and safeguard, be approved of by the comptroller," and then proceeds to the judgment of the court. "As in this case there has been no examination and allowance by the auditor, nor any approval by the comptroller, which," &c., thus indicating, if it be not a positive statement thereto,

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that the relator must fail, because the prerequisites of examination and allowance by the auditor and approval by the comptroller had not been obtained. This case, therefore, which has been frequently cited as an authority to sustain the proposition that the auditor of the finance department has the right, under the act of 1870, to examine and allow an account, that is, to pass upon its validity, notwithstanding its allowance by the board of supervisors, appears, upon careful examination of it, to afford little support in that direction. The substance relates to the necessity of an examination and allowance by the auditor and approval by the comptroller, whether of the voucher or claim does not distinctly appear; and the shadow, if the expression may be allowed, is the supposed declaration of the extended power of the auditor just stated. The right and duty of the auditor to examine the vouchers and to allow them, under the act of 1853, cannot be questioned, and therefore Ellis, the relator in case, *supra*, was not *rectus in curia*, and not entitled to the remedy he attempted to invoke. The distinction between examining and allowing the vouchers and examining and allowing the claim does not appear to have commanded the attention of the court in the case commented upon. The assumption seems to have been that the statute related to the demand, and that the authority of the auditor and comptroller was concurrent with that of the board of supervisors, although it is not expressly so said. The distinction, however, is one which cannot be disregarded. As suggested by justice SUTHERLAND, in *The People ex rel. Kelly agt. Haws* (12 *Abb. Pr. R.*, 192), in discussing the effect of the provision of the act of 1853, herein set out, "the power to examine, settle and allow accounts is one thing, and the power to examine, allow and approve vouchers is another thing. The word voucher would seem to mean or imply evidence, written or otherwise, of the truth of a fact that the service had been performed, not evidence of a legal or mental conclusion; the question whether the service or expenses, assuming the service and the expenses

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to have been in fact performed, paid or incurred, and probably counter-charges, or are properly allowable when the account for them is presented for allowance, or should be allowed to A. B. or to C. D." The vouchers to be presented, examined and allowed by the auditor are the account in proper form, verified, the resolution of the board of supervisors allowing it, and the acquittance or discharge to be signed on payment being made. The duty of the auditor is to see to it that the resolution relates to the account and is genuine; that the footing up of all the items, if several there be, is correct; that the account is verified properly, and that all these clerical duties shall have been duly observed to make the voucher a proper acquittance or discharge for the account paid. It was this safeguard that the legislature designed to perfect by the provision referred to, and thus to prevent the payment of an account, on resolution of the board of supervisors only, which might sometime facilitate frauds upon the treasury of the city. If, for example, the account of a claimant was allowed in a general way, one might be presented to the finance department differing in amount from that passed upon by the board, or not properly certified, or not in compliance with the statute, which requires that the clerk of the board shall designate upon every account, upon which any sum shall be audited and allowed, the sum audited and allowed, and the charges for which the same was allowed (*See vol. 1 Stat. at Large [Edmonds], page 340, § 12; also 1 Rev. Stat., 5th ed., 859, § 58*). And the examination and allowance of the vouchers, that is, all the prerequisites to payment, would in all probability detect the fraud or omission, if the auditor did his duty. The approval of the comptroller is a check upon the auditor, the former by his examination being advised of the nature of the vouchers and of the action of the auditor. This view of the question accords with the general duties of the finance department, which are not only to pay the bill presented for settlement, but to see to it that all the clerical tests are applied to ascertain that the amount demanded is correct. In its rela-

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tion to the board of supervisors this is apparent. That body acts judicially in reference to charges against the county, and its action is final and conclusive (*People agt. Supervisors Livingston*, 26 *Barb.*, 118; *People agt. Stout*, 23 *Barb.*, 344; *People agt. Lawrence*, 6 *Hill*, 244; *People agt. Supervisors of Dutchess*, 9 *Wend.*, 508; *vol. 2 Crary Sp'l Pro.*, p. 58, 3d ed., and cases cited; *Supervisors of Chenango agt. Birdsall*, 4 *Wend.*, 453; *Supervisors of Onondaga agt. Briggs*, 2 *Denio*, 26, 39; *People agt. Supervisors of Schenectady*, 35 *Barb.*, 408; *Huff agt. Knapp*, 1 *Seld.*, 65).

In this county its judgment does not, however, as we have seen, entitle the creditor to payment. He must submit his vouchers for examination, allowance and approval (*Act of 1870, supra*). The board determines the existence of the indebtedness, and the finance department must see to it that proper vouchers are presented, examined and allowed. The two things are in harmony and entirely consistent with each other; one relating to the examination and allowance of the claim, and the other to its payment upon the proper vouchers. It was not intended that the auditor should sit in judgment upon the demand, and to subject his decision to the approval of the comptroller. This would be, in effect, creating an appellate tribunal, composed of the auditor as chief acting officer, and the comptroller as supervisory. Whether the proceedings, on the part of the board of supervisors, are the subject of review, if fraudulent or from any cause illegal, is not the question now before us. It is not for us to say, either, on this appeal, whether the mandamus should be refused as a matter of discretion. There is nothing in the record to justify us in holding either that the claim is unjust or that the supervisors acted improperly in allowing it. The examination of its validity by the auditor is not a judicial proceeding. He had not the power to make it; and his conclusions differing, though they do, from those of the supervisors, are not *per se* evidence of fraud or unfairness. They are nothing more than those of any citizen who should devote

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himself to the subject. They cannot intervene to defeat the judgment of a competent tribunal. The result of these views is that the audit and allowance of the board of supervisors is conclusive of the right of the relator to recover his claim, subject only to the examination and allowance of his vouchers by the auditor and the approval of the comptroller thereupon ; and to the power of the court to intervene by due process, in case of fraud or collusion shown. These conclusions are sustained by Mr. justice SUTHERLAND, in *The People ex rel. Kelly* agt. *Haws* (*supra*), and in the recent cases of *The People ex rel. Haskell* agt. *Green*, decided by judge J. F. DALY in the common pleas, and *Ex rel. Patrick Martin* agt. *Earle and Green*, decided by justice FANCHER at a special term of this court. Notwithstanding these views and results, however, the relator must fail on this appeal. His application was for a mandamus to compel the comptroller to pay the demand allowed, and not to compel the auditor to examine and allow the vouchers and the comptroller to approve. The application thereto has not been made. The auditor has proceeded to examine and allow the claim as he deemed best ; but that is, as we have seen, not what he is to do. He has not examined or allowed the vouchers. The relator is not in a condition, therefore, to enforce payment until the statute is complied with, and he was not entitled to the relief demanded. He seems to have acted on the assumption that the credit and allowance of the board of supervisors were sufficient. In this he was in error. His course was to procure an examination and allowance of his vouchers, which, if refused, might be compelled by due process of law. The order appealed from must, for the reasons assigned, be affirmed.

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SUPREME COURT.

THE PEOPLE *ex rel.* JOHN S. DUFFIN agt. ABRAHAM L.
EARLE, Auditor, etc.

SAME agt. ANDREW HASWELL GREEN, Comptroller of the
County of New York.

Where a laboring man has performed four and a half months of approved labor for the county of New York, and has gone the rounds of circumlocution to have his labor certified to by the officer for whose office the services were rendered, and his bill scrutinized by a committee, and approved, audited and ordered to be paid by the board of supervisors, further technical impediment to its payment should not prevail, especially where the objection is made against the original claim and not against the vouchers thereof.

THE relator was employed by the board of supervisors of the county of New York as a cleaner of county buildings, and assigned to the work of attending the furnaces in and cleaning the offices of the register of deeds of the city and county of New York, and was so employed for four and a half months in the years 1871 and 1872. The board of supervisors, on the 12th day of December, 1872, audited and allowed his claim for compensation in the sum of \$180, and directed their comptroller to pay the same from the proper appropriation.

The relator presented his claim to the auditor of accounts and requested his audit, but the auditor, although requested by the relator more than two hundred times, failed to audit, and the comptroller, after demand, refused to pay relator's bill.

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It was shown that on the 12th day of December, 1872, and at the time motion was made, there was an appropriation applicable to the payment of relator's claim.

FANCHER, *J.*—The relator (a colored man) applied for a mandamus against the comptroller and auditor of the city, to enforce the audit and payment of the relator's bill of \$180, as a cleaner of county buildings. His affidavit asserts that on the 15th day of July, 1871, he was employed by the board of supervisors as a cleaner of the county buildings, and that on the 1st of December, 1871, he was assigned to attend the furnaces and fires in and to sweep and clean the office of the register. He entered upon his duties and faithfully performed the same up to the 15th day of April, 1872, a period of four months and a half, during which time his work was done under the supervision of the janitor of the county courthouse.

On the 19th day of September, 1872, his bill was presented to the board of supervisors and referred to the proper committee. On the 10th day of December, 1872, the said board unanimously passed a resolution duly allowing and auditing the bill at the sum of \$180, and directing the comptroller to pay the same from the proper appropriation.

There is an unexhausted appropriation for cleaning and county purposes out of which the bill can be paid, but after a proper presentation of the bill since its approval by the supervisors, the auditor refuses to audit it and the comptroller refuses to pay it.

The only excuse offered for the refusal is contained in an affidavit of the auditor, to the effect that, as he is informed and believes, the relator was not employed as a cleaner of county buildings on the 15th of July, 1871, nor at any time prior to the 15th of July, 1872, on which day he was so first employed, as appears by the proceedings of the supervisors, a transcript of which is annexed to the affidavit. But the transcript thus annexed is only a copy of the proceedings of

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July 15th, 1872. They show, it is true, that there was an appointment on that day, by a resolution of the supervisors, of a number of cleaners of the county buildings, and among them the relator, whose names are ordered on the pay-roll of the janitor of the new county court-house; yet because there was a new appointment of certain cleaners on that day, is it any proof that Duffin was not also theretofore appointed. He swears that he was appointed on the 15th of July, 1871, and rendered the service required under the appointment for the four and a half months above specified. There is no denial that his bill was approved by the register's indorsement and was properly presented to the supervisors; nor that the supervisors audited and allowed the bill on the 12th of December, 1872, and ordered it paid. Moreover, it appears that the relator rendered the services specified in the bill for such four months and a half, and that the fact has been certified to by the register by his indorsement of the bill.

I have referred to the printed proceedings of the board of supervisors, and find on page 105 of the proceedings for 1872, the following of December 12th, 1872:

"The committee on county officers, to whom was referred the annexed bill, respectfully report: *That the same is legally incurred*, but in the estimation of your committee the charges are too large, and are in favor of allowing the claims at the rate of forty dollars per month. The following is therefore submitted:

"*Resolved*, That the bill of John S. Duffin, for attending fires and furnaces at the register's office, amounting to \$291.66, be audited and allowed at \$180 (being four months and a half at \$40 per month), and the comptroller directed to pay it from the proper appropriation.

(Signed by five members, being the committee on county officers.)

"Resolution accepted and resolution adopted by the following vote, viz.:" (all the twelve supervisors present).

I think this substantiates the relator's statement that his

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bill was audited and allowed by the supervisors at \$180 on the 12th of December, 1872, and that the bill was then ordered by the supervisors to be paid. When, as in this case, it is shown that the labor for which the claim is made has actually been performed, the audit and approval of the bill by the supervisors is sufficient to create a county liability. While the vigilance and scrutiny of the comptroller's office are to be commended in resisting numerous improper demands on the city treasury, still, when a working man has performed four and a half months of approved labor for the county, and has gone the rounds of circumlocution to have his labor certified to by the register and his bill scrutinized by a committee, and approved, audited and ordered to be paid by the board of supervisors, further technical impediment to its payment should not prevail.

The motion for a mandamus to the auditor and comptroller is granted.

Alexander Presbyterian Ch. agt. Presbyterian Ch., cor. Fifth Avenue.

SUPREME COURT.

THE ALEXANDER PRESBYTERIAN CHURCH agt. THE PRESBYTERIAN CHURCH, CORNER FIFTH AVENUE AND NINETEENTH STREET.

Where a religious corporation, by means of subscriptions from its members principally, establish a mission school and chapel in another location, and purchase premises and erect buildings thereon, and continue such Sunday school and ministry in the chapel for a number of years, and the persons who statedly worship at said chapel become numerous and strong enough to be and are organized into a separate church corporation, under another title, with the consent of the original church, the new corporation does not thereby become vested with any rights in the premises they occupy to the exclusion of the original church.

Neither can the original church be declared a trustee of such premises for the benefit of the new corporation; on the contrary, the rights and ownership of the former in the premises are unchanged, and they are authorized to close up such Sunday school and chapel whenever they think proper.

New York Special Term, February, 1873.

THE defendants are a religious society incorporated under the laws of the state of New York. In or about the year 1853 they had established in the Seventh avenue, between Seventeenth and Eighteenth streets, a mission Sunday school, and it having been deemed advisable to establish a chapel in which religious services could be held, as well as the Sunday school, a subscription was taken up among the members of the defendants for that purpose; and with the money so raised a lot was purchased and building erected by the trustees of the defendants. The title to the premises was taken in the name of the defendants.

They from that time, up to the year 1865, continued to

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support the said chapel and Sunday school, almost entirely by contributions made by the defendants.

That in the year 1865, pursuant to the permission accorded by the laws of 1850, the persons statedly worshipping at the said chapel were separately incorporated under the name of "The Alexander Church," the plaintiffs in this action, and they continued to worship in that building until they were shut out of it by order of the defendants. This action is brought to have it established that the defendants hold said property in trust for the plaintiffs, and for an injunction restraining the defendants from all further occupancy of said building, and from the management and control of the Sunday school therein.

R. McK. ORMSBY, *for plaintiffs.*

OWEN, NASH & GRAY, *for defendants.*

VAN BRUNT, *J.*—I have been unable to see how the plaintiffs have established any right to the relief which they claim in this action.

It is true that the money which was subscribed and placed in the hands of the defendants was so intrusted to them for the purpose of procuring suitable premises in which to establish a mission chapel and Sunday school, and it may be that the subscribers to that fund would have the right to say that it should not be diverted from that purpose; but it is difficult to see how any person or persons other than the contributors to the fund have any standing in court, so as to complain of the manner in which the fund is administered.

No person can say that they have acquired any vested right to receive the benefit of that fund, and that they shall enjoy its benefits to the exclusion of all others, or that they have succeeded to the defendants as the persons authorized to manage said fund.

It is claimed that the persons worshipping in the chapel, by having, *with the consent of the trustees of the defendants,*

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become incorporated, have acquired some other or greater rights than they otherwise would have had. How such rights have arisen does not clearly appear. As members of the defendant's society they had no vested rights in this property, the sole management being in the defendants; and how, when their relationship with the defendants has ceased, such rights should have attached, except because their incorporation was with the consent of the defendants, cannot be explained. Before the incorporation of the plaintiffs, the defendants certainly could have closed these premises, and they have not in any manner surrendered their control over them.

Further, it appears that from the time of the acquisition of this property to the present time, the defendants have maintained in that building a mission school, the teachers and machinery of the school being supplied by the defendants, one of the very purposes for which this money was subscribed and the property bought, and by this action the plaintiffs seek to deprive the defendants of the use of any part of this building for the uses of *their* mission school. Although they do not ask this in so many words, yet in effect it is the same, because they do ask that the defendants may be restrained from the further occupancy of said building. In other words, they have bought and paid for the buildings for the purposes of a school, and are now to be deprived of the use of them for that purpose, because the persons whom they have allowed to worship in that building have become strong and numerous enough to form a separate organization. This would, it seems to me, instead of carrying out the wishes of the donors, be going directly contrary to them.

This property may be trust property, but it is to be managed by the defendants as they see fit, only to be called to account, if by any body, by the persons who contributed the fund; certainly not by any persons who may have enjoyed the benefit of the fund.

The complaint must be dismissed.

Pacific Steamship Co. agt. Com'rs of Taxes and Assessments.

SUPREME COURT.

THE PEOPLE ex rel. THE PACIFIC MAIL STEAMSHIP COMPANY
agt. THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR
THE CITY AND COUNTY OF NEW YORK.

In ascertaining the value of the *capital stock* of a corporation for the purpose of *taxation*, the commissioners of taxes and assessments, where there is no sworn evidence before them, are justified in ascertaining such value from other sources, as they do in valuing real estate.

In addition to this it is equally the duty of the commissioners to consider the *indebtedness* of the corporation as reducing the actual value of the stock, and form their estimate on that basis.

All *personal property* belonging to a corporation permanently located *out of this state* is exempt from taxation here. Such property, therefore, is not to be valued as part of the capital stock of the corporation.

CERTIORARI to the commissioners of taxes and assessments of the city of New York.

First Department, New York General Term, December, 1873.

Before INGRAHAM, P. J., BRADY and FANCHER, JJ.

MORRIS & BILLINGS, *attorneys for relators.*

The relators were assessed for personal property for the year 1873 in the sum of \$20,000,000, which is the exact amount of their capital stock. Feeling aggrieved by this assessment they made timely application to the commissioners of taxes and assessments to have the same corrected, and thereupon F. W. G. Bellows, the vice-president of the relators, was examined under oath by the said commissioners, and his written deposition thus taken is annexed to their return to the writ of certiorari herein, and is marked schedule A.

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By this deposition it appears that the Pacific Mail Steamship Company was incorporated for the purpose of building, equipping, furnishing, fitting, purchasing, chartering and owning vessels to be propelled solely or partially by the power of steam, or other expansive fluid or motive power, and to be run and propelled in navigating the Pacific ocean; that the greater portion of the operations of said company are necessarily transacted, and always have been, outside of the state of New York, and that nearly all the real and personal property belonging to said company is necessarily, and always has been, located beyond the limits of said state; that the place of business of said company is intended and used only for the purpose of the general management of its affairs, the meetings of its stockholders and board of directors, and the keeping of its general accounts and records; that schedules B and C, annexed to said deposition, contain true and accurate statements of all the personal property belonging to said company, which, on and between the first days of January and February, 1873, was situated within the state of New York, and the respective values thereof, and that all the rest of the personal property of every kind and description which belonged to said company, or to or in which it was in any way entitled or interested at the time the assessment was made, *was then permanently located beyond* the limits of this state.

It was claimed, on said application, that the relators could not be legally taxed for any of the property described in said schedule B, and this claim has been allowed by the said commissioners.

It was also claimed on behalf of said relators that all portions of their personal property which, on and between the said first days of January and February, 1873, were situated beyond the limits of the state of New York were exempt from taxation by the laws of said state, and that the only portion of such personal property for which they were liable to be taxed under the laws of this state for the said year 1873 was that which is described in the said schedule C, annexed to

said deposition, the aggregate value of which is \$1,736,371.99. The commissioners rejected this claim of the relators to have the said assessment reduced to the said sum of \$1,736,371.99, and fixed it at \$6,808,927, which necessarily includes the value of personal property of the relators which, at the time aforesaid, was permanently located beyond the limits of this state.

The relators, claiming such decision to be erroneous, have taken this proceeding to have the same corrected.

I. The only evidence before the commissioners on the application to correct this assessment is contained in the said deposition of F. W. G. Bellows, the vice-president of the company, which was sworn to before one of the commissioners.

On the return of a writ of *certiorari* the court can only look at the facts returned. It will not assume that there was other evidence before the inferior tribunal to sustain its acts (*The People agt. Soper*, 3 *Seld. R.*, 432).

The facts contained in the said deposition are uncontradicted. The commissioners were therefore bound to act in accordance therewith (*The People agt. Howland*, 61 *Barb.*, p. 285).

Under the assessment law, as it stood under the Revised Statutes, and before the amendment of 1851, the assessors were bound to correct their assessment roll on the application of any person assessed, in accordance with his affidavit, made and produced to them in conformity with the statute (*Livingston agt. Hollenbeck*, 4 *Barb. S. C. R.*, 9; *The People agt. Supervisors of Westchester Co.*, 15 *id.*, 615). The act of 1851, amending this statute (*see Laws of 1851, chap. 176, p. 334*), takes away the *conclusiveness* of the affidavit before required, and makes it the duty of the assessors to examine under oath the person applying for a reduction of the assessment, touching the value of his property, and after such examination to fix such value as they may deem just. But this provision does not give the assessors any right to fix such value arbitrarily or capriciously, and when they have no ground

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in the evidence so taken to fix a valuation different from that sworn to by the person applying for such reduction, they are bound to follow his statement under oath as much so as the assessors were bound by the affidavit formerly required (*The People* agt. *Reddy*, 43 *Barb. S. C. R.*, p. 544; *The People* agt. *Ferguson*, 38 *N. Y. R.*, p. 92).

But there is no dispute about the facts, it not being pretended that the original assessment of \$20,000,000 was the result of any investigation by or under the direction of the commissioners, in relation to the value of the capital of the relators, or the particular kinds of property in which it was invested, or the places in which the same was situated. It is clear, from the return, that the commissioners merely assessed the relators in the full amount of the *nominal* value of their capital, leaving them to apply for such deductions as they might be entitled to.

It was upon the application of the relators to reduce this assessment that the *first* investigation of these matters was made by the commissioners; and this deposition of Mr. Bellows contains the only information upon which their action on such application was founded. In no other way did they acquire the information which enabled them to decide that the *actual* value of the capital of the relators was \$10,000,000, or that the deductions which they have allowed should be made; and they had full power and opportunity by a further examination of Mr. Bellows, or of other parties, to investigate any matter contained in his deposition, concerning which they might require further information.

II. It must therefore be assumed as a fact that, exclusive of the property described in schedule B, annexed to the said deposition of F. W. G. Bellows, and which is admitted to be exempt from taxation, the only other portion of the personal property of the relators which, at the time aforesaid, was situated within the limits of this state, is correctly described in schedule C, annexed to said deposition, and that the aggregate value thereof did not exceed the sum of \$1,736,371.99;

and the claim which we make is that this is the only portion of the personal property of the relators for which they were liable, under the laws of this state, to be taxed for the year 1873, the remaining portion of such personal property having been at the time aforesaid permanently located beyond the limits of this state, and therefore exempt from taxation.

III. The act which is the basis of all taxation in this state (*see 1 N. Y. Statutes at Large, Edmonds' ed., p. 360*) is entitled, "Of the property liable to taxation." And in the first section of this act the *subject* of the taxation is described "as all real and personal estate *within* this state, whether owned by individuals or by *corporations*."

This language contains an *implied* declaration that all lands and all property situated *without* the state, whether owned by individuals or corporations, is *not* liable to taxation.

IV. The proper construction of this act, so far as it relates to *individuals*, was settled by the court of appeals in the case of the *People ex rel. Hoyt* agt. *The Commissioners of Taxes and Assessments* (23 *N. Y. R.*, p. 224). It was held in that case that a resident of this state is not taxable here upon such of his personal property *as is actually situated out* of this state, and that such property is not taxable here upon the fiction that its *situs* follows that of the owner.

The opinion of the court in that case was intended to embrace only property which is *visible* and *tangible*, so as to be capable of having an *actual situs* away from the owner or his domicile. But in the subsequent case of the *People ex rel. Jefferson* agt. *Gardner* (51 *Barb. S. C. R.*, 352), the principle is extended to capital invested in loans in other states, *taken and held in those states by agents*.

Although these decisions relate merely to *individuals*, they apply with equal force to corporations, there being nothing in the opinion of the court in either case which restricts its operations to individuals.

And in the case of the *People ex rel. Bank of the Commonwealth* agt. *The Commissioners of Taxes and Assessments*,

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which was decided at the *same* term of the court of appeals as the case of *Hoyt* agt. *The Commissioners of Taxes and Assessments* (*supra*), it was declared that corporations are *now* entitled to the same exemption of property from taxation as individuals (*The People ex rel. Bank of the Commonwealth* agt. *The Commissioners*, 23 *N. Y. R.*, pp., 194, 195).

Mr. ch. j. COMSTOCK, in his opinion in the last mentioned case, says: "The language of the statute is that all lands and personal property *within* this state, whether owned by individuals or *corporations*, shall be liable to taxation. If this language does not apply the same rule of taxation and exemption to individuals and corporations, I greatly misapprehend its meaning" (23 *N. Y. R.*, 215 and 216).

But the opinion of the court is principally based upon the change in the system of taxation of corporations effected by the act of the legislature of this state, passed April 15th, 1857.

Prior to this act the principle of taxation of moneyed corporations was that the amount of the capital, except such portion thereof as had been paid out for the purchase of real estate, was to be taken as the amount of the personal estate of the corporation for which it was to be taxed, whether it had been impaired by losses or increased by accumulated profits (*id.*, p. 193).

By section 3 of the act of 1857 (*see L. 1857, ch. 456*) it is declared that the capital stock of every company liable to taxation "shall be assessed at its *actual* value, and *taxed in the same manner as the other personal and real estate of the county.*"

By this act two important changes were effected in the system of taxing corporations: 1st. The capital was no longer to be taxed at its *nominal* but at its *actual* value; 2d. The *property* constituting the capital was to be taxed in the same manner as the property of individuals (*Bank of Commerce* agt. *City of New York*, 2 *Black. R.*, 629; *opinion of Mr. justice NELSON, Bank Tax Case*, 2 *Wallace*, 200-210).

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In construing this section, full effect must be given to *both* of its clauses. There would be no meaning in the second clause if the only change intended by the legislature had been that contained in the first.

In the case of the *Bank of the Commonwealth* agt. *The Commissioners of Taxes* (*ut supra*), DENIO, J., says, at page 194: "In 1857 an act was passed which completely changed the system of assessment of corporations." Under this act "it is the duty of the assessors to ascertain the character and worth of the securities in which the funds of the corporation have been invested. It is equally their duty to inquire whether any of the property into which the capital has been converted is *exempt* by law from taxation" (*id.*, p. 195).

"Whether such exempt property belongs to an *individual* or to a *corporation* taxed upon its capital, *the rule is the same*. The *exempt* property is to be deducted from the aggregate valuation, and the tax is to be imposed upon the *residue*" (*id.*, pp. 214 and 215).

V. The case of *Hayes* agt. *Pacific Mail Steamship Company*, decided by the supreme court of the United States, and reported in 17 *How. R.*, p. 596, affords no guide for the decision of the question presented by this case.

It was decided in 1854, *before* the change in the system of taxation of corporations in this state, which was effected by the act of 1857, and one of the facts dwelt upon by Mr. justice NELSON in his opinion, in that case, was that "taxes had been assessed upon all the *capital* of the Pacific Mail Steamship Company, *represented by the steamers*, in the state of New York, *under the laws of that state*, ever since they had been employed in the navigation down to that time." Another essential fact, upon which the judgment in that case was founded, was that these steamers were *in transitu*, *having no situs* in California nor permanent connection with its internal commerce (*see opinion of Mr. justice CAMPBELL*, p. 600).

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In the present case, the irresistible inference to be drawn from the deposition of Mr. Bellows, which states that all these steamers, at the time this assessment was made, were *permanently located beyond the limits of this state*, is, that they were *not* then *in transitu*, but had an *actual situs* out of the state, and that being so, the fact, even if true, that they were registered in the city of New York, is of no importance. See *St. Louis agt. Wiggins' Ferry Company* (40 *Missouri R.*, p. 590), in which case Mr. justice HOLMES, delivering the opinion of the court, says: "The personal property of the company which is permanently located or actually situated in Illinois is, no doubt, taxable there only; but these registered boats must be held to be taxable here only. It does not necessarily follow from this that all boats and vessels that may be registered at this port must be liable to taxation here."

But there is no evidence whatever, in the papers before the court, to show that these steamers are or ever have been registered at New York, and no presumptions in favor of it are to be indulged in.

The commissioners had full opportunity to investigate that subject, if they had deemed it important, by a further examination of Mr. Bellows or of other parties, but neglected to do so; and the argument that these steamers must have been registered in New York, as they could not legally be registered elsewhere, this being their home port, under the act of congress relating to the registry of vessels, is altogether fallacious: 1st, because there is no evidence that they have been registered anywhere; and, 2d, because they may all have been purchased by the relators while they were in a district other than the one which includes the port of New York, in which case they were entitled to, and could only, be registered by the collector of the district where they happened to be at the time of such purchase (*see act in question*, 1 *U. S. Statutes at Large*, p. 292).

VI. There are, undoubtedly, many cases which seem to

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hold that the *situs* of a vessel must of necessity be the place of its registration, but a careful examination of them will show that no such doctrine has really been held, *except in cases of vessels regularly departing from and returning to the port where they were registered.*

And, upon principle, there is no reason why the fiction of law, that the *situs* of personal property follows that of the owner, which it is admitted does not prevail for the purposes of taxation in regard to other personal property, should be applied to steamships which have an *actual situs* out of this state.

VII. But admitting, for the sake of the argument, that the *situs* of these steamers, at the time of this assessment, was the city of New York, and that they were, therefore, legally liable to be taxed here, their taxable value did not exceed the sum of \$2,500,000 (*see deposition of Mr. Bellows, printed papers, p. 11, fol. 30*), which sum, added to the aggregate value of the property described in schedule C, annexed to said deposition, viz., \$1,736,371.99, would make the sum for which the relators were taxable, for the year 1873, \$4,236,371.99 instead of \$6,808,927, at which it has been fixed by the commissioners, a difference of \$2,572,655.01. It is very clear that if the commissioners had assessed these steamers at a higher figure than \$2,500,000, they would necessarily have valued the capital of the relators at more than \$10,000,000. They could not, consistently with the deposition of Mr. Bellows, have materially reduced the figures at which he estimates the value of the other descriptions of personal property belonging to the relators, as shown in the several schedules annexed to said description.

VIII. The result is, that if the steamers described in schedule D, annexed to said deposition, should be included in the assessment, the sum upon which the relators were liable to be taxed for the year 1873 was \$4,236,371.99, and if these steamers *should be excluded*, as we claim, then such sum should be reduced to \$1,736,371.99, which is the aggre-

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gate value of the property described in schedule C, annexed to said deposition.

IX. If the relators are not entitled to the exemption contended for, then the commissioners erred in not deducting from the actual value of the capital of the relators the amount of their debts, as shown in the said deposition of F. W. G. Bellows, and estimated in the aggregate at the sum of \$2,834,398.09 (*See p. 12 of printed papers*). This would be a proper reduction in the case of an individual, and by the act of 1857, above referred to, the capital stock of every corporation, liable to taxation, is to be taxed in the *same manner* as the property of individuals (*The People agt. Ferguson*, 38 N. Y., 91).

X. No difficulty arises from the fact returned by the commissioners, that they have delivered the assessment rolls to the supervisors. The *writ of certiorari* was issued and served on them before they made such delivery (*see affidavit of O. P. C. Billings*). This arrested the rolls in their hands and stayed all proceedings upon them. And this court can direct a *writ of certiorari* to the board of supervisors to bring the assessment rolls before it, and direct its clerk to correct the same (*The People agt. Reddy*, 43 Barb. R., p. 545).

XI. Again, if the exemption contended for cannot be allowed, the commissioners erred in not deducting from the actual value of the capital of the relators the sum of \$5,106,000, which is the aggregate value of the steamships included in schedule D, annexed to the said deposition.

The value of these steamships necessarily forms part of the value of said capital, as ascertained by said commissioners, and the ships themselves are exempt from state taxation: 1st, because they are employed in foreign commerce; 2d, because they are employed by the government of the United States in transporting the mails; 3d, by reason of the provision of the constitution of the United States (*art. 1, § 10, sub. 2*), which prohibits the state from laying any duty on tonnage; 4th, by reason of the provision of the constitu-

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tion of the United States (*art. 1, § 9, sub. 5*) which declares that no preference shall be given by any regulations of commerce or revenue to the ports of one state over those of another (*Gibbons agt. Ogden, 9 Wheat., p. 498; Brown agt. State of Maryland, 12 id., 419; Passenger Cases, 7 How., 400; The People agt. Brooks, 4 Denio, 476; City of New York agt. Miln, 1 Peters, 136; McCulloch agt. The State of Maryland, 4 Wheat., p. 316; Weston agt. The City of Charleston, 2 Peters, 467; Bank of Commerce Case, 2 Black, 260; Osborn agt. The Bank of the United States, 9 Wheat., 738*).

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The writs of *certiorari* in these cases were sued out to review the action of the commissioners of taxes in assessing certain corporate bodies.

They all raise, in some manner, the general questions as to what is the correct method, under the laws of this state, of assessment upon corporations; and these general questions are treated in this brief. Such questions as are peculiar to each case will be discussed in separate briefs.

The Pacific Mail Steamship Company is a New York corporation, having its principal place of business in the city of New York; but it was incorporated for the purpose mainly of establishing and running a line of steamships between ports and places on the Pacific ocean, and such has been and is its principal business.

The bulk of its actual operations are carried on and the greater part of its property has been situated outside of this state; but the general management of its affairs, including its financial concerns and corporate meetings, is carried on within this state.

The commissioners of taxes, in determining the amount for which it was to be assessed, pursued the following method, which they suppose to be that prescribed by law. They

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determined, upon such evidence as was open to them, that the *actual value* of the capital stock (the nominal amount of which was \$20,000,000) was \$10,000,000, and deducted therefrom the cost of the real estate belonging to the company \$2,091,073, for United States bonds belonging to the company \$100,000, and for stock of the Panama railroad belonging to the company \$1,000,000, leaving the sum of \$6,808,927 as the amount upon which the company was to be assessed and taxed.

It is presumable that the commissioners, in determining the *actual value* of the capital stock, were guided, in whole or in part, by the market value or price. Whether they took into consideration the other facts which the relators spread before them, such as the location of a large part of the company's property outside of the state, does not precisely appear. The relators assume that they did not, and it is only upon this assumption that any question is raised by the record for argument and decision.

The benefit of this assumption being yielded to the relators, they deny the correctness of the method of assessment pursued by the commissioners; but it does not clearly appear what other method, in their view, the commissioners should have adopted. They must, however, insist that the commissioners should have followed one of the two following methods:

First.—After ascertaining the actual value of the capital stock in the manner in which they did ascertain it, make, in addition to the deductions they did make, the following: for property situated outside of the state the aggregate amounts in schedules D, E, F and G of the "statement."

Second.—Assess this corporation in precisely the same way as they would assess an individual, by ascertaining the amount of its *property* in this state subject to taxation, and after making the deductions required by law, take the residue, if any, as the sum upon which the tax is to be imposed, without any reference to the value of the capital stock.

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I. The writ is tested June 30, 1873, and returnable on the first Monday of October following. It does not appear when it was served; but the service would not stay the action of the commissioners. It appears, by the return, that the commissioners have discharged their functions and delivered the assessment rolls to the supervisors. No correction can now be made in those rolls by any judgment against the commissioners. This *certiorari* cannot, therefore, be made effectual, and should be quashed or dismissed (*The People* agt. *The Commissioners of Taxes*, 43 Barb., 494; *The People ex rel. Rapplee* agt. *Reddy*, 43 id., 539; *The People* agt. *Fredricks*, 48 id., 173; *The People ex rel. Marsh* agt. *Delaney*, 49 N. Y., 655.)

II. The relators claim that the commissioners have not made any allowance in their favor for property situated outside of the state, nor for their indebtedness. This does not appear by the return. For anything appearing in the return, it may be that, in determining the *actual value* of the capital stock for the purposes of making the assessment, they took into consideration the *situs* of the company's property, and also the amount of the indebtedness. For aught that appears, the value of the whole stock, according to the market price, would be *twenty* millions. If they did so, and failed to allow as much weight to this consideration as it may have deserved, the error is not reviewable by this court. Their jurisdiction is conceded, and their conclusions are not impeachable, unless it appears *affirmatively* that they refused to give the relators the benefit of some distinct legal right

1. Upon what evidence they acted, in determining the *actual value* of the capital stock, does not appear. The maxim "*omnia presumuntur rite acta esse*" is to be applied in their favor. It is made their duty to assess the taxable value of property, and they are to discharge this duty by resorting to the usual modes of ascertaining such a fact. The presumption that their conclusions are correct stands until the contrary appears, not *probably*, or by *conjecture*, but with

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affirmative certainty (*Oswego Starch Factory agt. Dolloway*, 21 N. Y., 449).

III. The assessment against this company may be so presented in argument as to wear the appearance of *hardship*; but care should be taken not to hasten to the conclusion that the hardship, which must frequently result from the operation of general laws in particular cases, is a consequence of error in the interpretation of the law.

1. If an unequal, harsh or oppressive system of imposing and distributing the public burdens is adopted by the legislature, the courts can furnish no remedy. The only means of relief against an excessive imposition is by an amendment of the law and petition for restoration (*Sedgwick on Statutory and Constitutional Law*, 502).

2. In the practical working of the best system of taxation which human wisdom could devise there would still be found much inequality, of which those who felt the burden would complain, as if it were an injustice; but for such mischiefs there is no remedy which courts or even legislatures can furnish. They are inherent in the nature of the subject.

3. In cases like the present, therefore, the only function which courts can perform is to inquire what the scheme of taxation adopted by the legislature is, and whether it has been correctly interpreted and applied by the officers appointed to administer it.

IV. The various questions raised by the several cases at bar cannot be correctly determined without a reference to the theory and history of the system of taxation adopted in this state. In relation to a subject which affects so directly the personal and selfish interests of all, including the legislators who have dealt with it, and which has at one time been under the control of one interest, and at another time of another, it would be unreasonable to expect to find entire consistency and harmony, either in the theory or history of the system; but this consideration only tends to make the inquiry difficult. It does not render it useless.

V. The political economist, unembarrassed by the practical difficulties of administration, and dealing only with the question how the public revenues could be drawn with the least injury to the public wealth, and with the least inequality, would distribute the burden among the people according to the ability of each individual to bear it, and would perhaps impose a tax upon *persons* according to their several *incomes*, as the sole method of raising the entire public revenue. The practical legislator, in view of the impossibility of accurately determining the incomes of individuals, would reject such a method.

VI. The *general* solution given by the legislation of New York to this problem has been to impose the whole burden upon the *property* lying within the state, and is well expressed in the general enactment. "All lands and all personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified" (*R. S., part 1, chap. 13, tit. 1, § 1*).

VII. For the purposes of taxation no *general* rule more equal or just could be devised than to estimate the property assessed according to its value, and such general rule was accordingly adopted (1 *R. S., 1st ed., 393, § 17*).

VIII. The *general* equity of this rule has, however, limitations. The ability of property to bear public burdens may be greatly affected by the manner in which it is held, the purposes to which it is applied, and the degree of individual labor and responsibility requisite to its care and preservation. If a man may take a portion of his property and have it united with the contributions of many others, and devoted to some profitable use, under circumstances involving little expense, and with complete security against responsibility for the acts of those who manage it beyond the amount of his contribution, the *value* of such property and its ability to bear public burdens may be vastly increased. Such added value may be conferred upon property by the *privilege of incorporation*, which is the gift of the state, and at the time of the last gene-

ral revision of our laws a vast amount of property was held by bodies thus constituted.

1. It may be said that the value of the property was not increased, but that the additional value was properly that of the *franchise* thus bestowed, which was separate from the property, and might, with the legislative assent, be made the subject of separate sale. It is, however, quite immaterial for the present purpose in what mode this additional value should be expressed.

2. The cases at bar furnish apt illustrations of this source of value. The Pacific Mail Steamship Company sets forth in its schedule D property worth, as it declares, more than \$5,000,000, which, aside from the mode in which it is invested and employed, would not be worth over \$2,500,000. And the Dry Dock, East Broadway and Battery Railroad Company allows us to believe that its franchise alone, the free gift of the state, is worth the whole amount of its capital stock, namely, \$1,200,000.

A ferry company may have, as visible, tangible property, only a couple of old steamboats, worth \$10,000 each; but its franchise may enable it to pay large dividends on a nominal capital of \$100,000.

IX. That the additional value thus imparted to property by a franchise, or, to express it in other words, the franchise itself, should be made to bear its proportion of the public burdens, is certainly a just and sound policy, and has long been established in the legislation of this state.

1. By the system pursued in the early history of the state, corporations were not taxed at all, *eo nomine*, but in the assessment against individuals any stock in a corporate body was embraced at its *actual value* (*act of April 15th, 1813, § 42; 2 R. L., 521, 522*).

2. This "*actual value*" did not depend merely upon the value of the visible and tangible property of the corporation, but upon its productive capacity, and in this way the added

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value embraced in or conferred by the franchise was reached and made to bear its share of the public burden.

X. But the defects of this method are obvious. It is not easy to discover who are in fact the stockholders of a corporation. The books of a corporation in one part of the state are not easily accessible to the assessors in another part. There are no sure means of enforcing the collection of a tax against a *person* after it is assessed. Besides, stockholders out of the state could not be assessed at all by this method.

XI. It was doubtless in view of these difficulties that at the next general revision of the tax laws of the state the system was changed. Individual stockholders were no longer to be assessed for their respective shares, and the corporations were to be assessed and taxed, as for personal estate, on the nominal amount of their respective capitals, after deducting therefrom the cost of their real estate (*act of April 23d, 1823; Laws of 1823, p. 390*).

1. It will be observed that neither here any more than in the former method was the amount of the tax measured by or in any way made directly to depend on the value of the visible or tangible property of the corporation, or the amount of its debts. The intention to make the added value conferred by or embraced in the franchise is manifest, and the nominal capital is taken as calculated to furnish, in general, a fair representation of it.

2. There are obvious deficiencies and inequalities in this method. It takes no notice of those diminutions of capital which result from losses or otherwise; and, on the other hand, no notice of the increased value which capital stock receives from the increased productiveness of the corporate business or accumulations of surplus capital; so that if the market price of the shares should sink from *par* to fifty per cent, or rise to 200 per cent, the amount required to be paid to the tax gatherer would be unaffected.

3. A provision was indeed made by the act last mentioned whereby corporations whose profits did not exceed a certain

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amount should be required to pay by way of tax a certain moderate percentage upon such profits.

XI. In the elaborate revision of 1827 the same scheme in its *general* features was preserved. Individual stockholders were made exempt from taxation on their shares, and the corporation itself was assessed and taxed on the nominal amount of its capital, deducting the cost of its real estate and the amount of its stock, if any, belonging to the state, or to incorporated literary and charitable institutions (*R. S., part 1, chap. 13, tit. 4, § 6*; 1 *R. S., 1st ed.*, 414, 416).

1. Some exceptional provisions were for the first time introduced, which should be noted.

a. Manufacturing and turnpike corporations were to be assessed on the *cash value* of their stock, and it was declared that this should "be ascertained by the assessor by the sales of the stock or in any other manner" (*sec. 7*).

b. The provision which had long been in force permitting a reduction in the assessments of the property of individuals, and which was preserved in respect to such assessments by the fifteenth section of the second title of the chapter above mentioned, was extended to corporate bodies. The section thus extending this provision (*section 8*) was not reported by the revisers, but was added by the legislature. It certainly was an incongruity, so far as respects the taxation of the personal estate of corporate bodies, and the section introducing it was repealed in 1851.

c. Provision was also made allowing manufacturing and marine insurance companies, whose annual income did not exceed five per cent on their capital stock, to commute by paying in lieu of other taxation five per cent of their net income (*sec. 11*).

d. And turnpike, bridge and canal companies, whose income did not exceed five per cent on their capital, were wholly exempted from taxation.

2. It is worthy of notice that by the last revision the provisions for imposing taxes upon individuals and corporate bodies

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were kept entirely separate and distinct, and, obviously, for the reason that the systems were so different—the one proceeding upon an actual valuation of visible and tangible property, and the other upon an assumed valuation embracing both tangible and intangible subjects—that confusion would result unless this separation was maintained. In order to apply a provision relative to the assessment of individuals contained in the second title to the assessment of corporate bodies, a special clause was deemed requisite (*sec. 8 of tit. 4*).

XII. The preceding review makes it manifest that in all the legislation, up to and including the last general revision, the *general* scheme of taxation, in respect of the property, other than real, of corporations did not look to any valuation of their *property as such*, or where it might be situated, or take any account of their debts in determining the amount on which they should be taxed, and such is the uniform view of all the authorities (*The Bank of Utica* agt. *The City of Utica*, 4 Paige, 399; *The People* agt. *The Sup'rs of Niagara*, 4 Hill, 20; *The Oswego Starch Factory* agt. *Dolloway*, 21 N. Y., 449; *The People ex rel. Bank of Commerce* agt. *The Com'rs of Taxes*, 40 Barb., 334; *The People ex rel. The Bank of Commerce* agt. *The Com'rs*, 2 Black., 620).

XIII. It would not, however, be correct to say, notwithstanding the *dictum* of Mr. justice NELSON in the case last above cited, that the tax thus assessed was “like one annexed to the franchise as a royalty for the grant.” It was the scheme devised to carry out the leading principle, “All lands and all personal estate within this state, whether held by individuals or by corporations, shall be liable to taxation, subject to the exceptions, &c.”

1. If it was designed as a royalty for the grant of a franchise, it would follow, contrary to the emphatic enactment just quoted, that all the personal property of corporations was *exempted* from taxation.

2. If the scheme did not refer, in terms, to the personal property of corporations, it did not ignore it in fact, and the

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same may be said of the franchise. It adopted a system calculated to impose upon *both* their fair share of the public burdens. It viewed the nominal capital as designed to represent, and as, in fact, representing both.

XIV. The legislation, since the Revised Statutes, has not changed the essential features of the scheme as hereinbefore presented. We mean by this that now, as formerly, it is the design of the law to view the personal estate of a co-operative body as blended inseparably with its franchise; and its value as so affected thereby that the scheme for assessing the personal estate of individuals is not to be applied to the assessments against corporations, except where it is specially so declared.

1. The act of April 15th, 1851 (*Laws of 1851, p. 333*), abolished section 15 of title 2, chapter 13, part 1 of the Revised Statutes, which required the assessors, upon the oath of a party that his real or personal estate did not exceed a certain value, after, in the case of personal estate, deducting his debts, to reduce the assessment to the amount sworn to; and provided another form of relief against excessive assessments by requiring the complaining party to submit to an examination upon oath, and after such examination it authorized the assessors to modify the assessment as might seem to them just. This provision was, in 1857, extended to corporations (*act of April 15th, 1857, § 2 Laws of 1857, vol. 2, p. 123*). The effect of this is to give the assessors power to correct an assessment, and allow them a large discretion in respect to the grounds upon which they may act.

2. In 1853 (*Laws of 1853, p. 1240*), some important changes were introduced into the system established by the Revised Statutes, though they have no special bearing on the present inquiry.

1st. The total exemption of companies showing they had made no profits was abolished, and instead of this all were allowed to *commute*, by paying five per cent of their profits, when such profits did not exceed five per cent of their capital.

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2d. A provision was introduced making them taxable on their "surplus profits or reserved funds," exceeding ten per cent on their capital.

3. The discrimination between corporations of different kinds, founded on the nature of their business, was abandoned, and all were to be taxed upon the same rule, which was to assess them for the amount of their capital, and their surplus profits or reserved funds exceeding ten per cent on their capital, after deducting the cost of their real estate. This provision was, doubtless, suggested by the practice of many corporations to make large additions to their capital in fact, without any change in their nominal capital.

4. The act of April 15, 1857 (*Laws of 1857, vol. 2, p. 1*), introduced an important change in the principle of valuation. The capital stock, together with the surplus or reserved funds exceeding ten per cent on its capital, after deducting the assessed value of its real estate, and all stock which might be owned in other corporations liable to taxation, was to be assessed at its *actual* value. The principle of taking the nominal amount was abandoned, and that of actual value substituted in its place.

5. The expression, "*assessed* value of its real estate," has been held, on the view that all the legislation on this subject is to be construed together, to mean its value as assessed under the rules elsewhere laid down, that is to say its cost. Different constructions have also been suggested as to whether the surplus profits are to be added to the capital and the cost of the real estate then deducted, or the cost of the real estate first deducted from the surplus profits, and the remainder, if any, then added to the capital (*The People ex rel. The Citizens' Gaslight Co. agt. The Board of Assessors of Brooklyn*, 39 *N. Y.*, 81).

6. The object of the amendatory act last above mentioned was, doubtless, to remedy an inequality which bore harshly upon those unfortunate corporations which made little or no profit, and which yet were taxed on the same rule with those

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which made large gains; and the plan fixed upon was the same which had been applied to manufacturing and turnpike companies by the seventh section of the fourth title of the thirteenth chapter, part 1 of the Revised Statutes. That section declared that the "cash value mentioned in it should be ascertained by sales of the stock or otherwise." The act of 1857 is silent as to the mode of ascertaining the value, but should receive a similar interpretation with the seventh section referred to (DENIO, *J.*, in *Oswego Starch Factory agt. Dolloway*, 21 *N. Y.*, 458).

7. It would seem that the legislature, in introducing the principle of taking the actual value, should have abandoned the practice of taxing for the surplus profits or reserved funds, which enter as an element into the actual value. This incongruity seems not to have occurred to the legislature. A practical method of meeting it is suggested by DENIO, *J.*, in his opinion above referred to.

XV. It will be seen from the foregoing review that at all times it has been, and still is, the settled scheme of our law, that the assessment of the personal estate of corporations is not to be made, like that of individuals, by taking an inventory and making an assessment of their property, and deducting from the aggregate thus found the amount of the debts, but by ascertaining by sales of the stock, and other evidence, if necessary, the actual value of the capital stock. The claim of the Pacific Mail Steamship Company, so far as it proceeds upon the view that the commissioners erred in fixing the capital at its actual value by reference to the market price, has no just foundation.

XVI. But their claim may be differently stated thus: That the commissioners properly enough considered the market price, but made an error in allowing it to control their determination; and that *in determining the actual value* they should have given more weight to the facts spread before them in the statements of the company. But the answer to this is, that the whole business of determining the actual

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value of the stock is committed by law to the judgment of the commissioners, and that their conclusions cannot be set aside by the courts for error, *unless they have denied to the relators the benefit of some specific legal right*. So far as respects their action in finding the actual value of the stock, this does not appear.

1. They had before them all the evidence, and found the actual value of the stock to be ten millions. For aught that appears, its market value was twenty millions. For aught that appears, they made allowance for every one of the grounds of deduction presented to them.

XVII. It may be urged that, conceding that the action of the commissioners in determining the actual value of the stock cannot be reviewed, still, after having fixed such value, deductions should have been made therefrom for all such property in which the capital of the company was invested as was by law *exempt from taxation*, and that all its personal property *outside of this state* was so exempt.

1. The first answer to this is, that it does not affirmatively appear that the commissioners did not make allowance for this in fixing the actual value of the stock for the purposes of taxation.

2. The second answer is, that the legislature has carefully specified the deductions which are to be made from the assessed value of the stock, and this is not one of them. It is plainly the legislative intent to point out *all* the deductions to be made. "*Expressio unius est exclusio alterius*."

3. The general features of the present scheme were introduced at the time when corporations were first assessed *eo nomine*, by the act of 1823, already referred to. At that day the instances of property being held outside of this state by domestic corporations were few and unimportant. There is no probability that the idea of exempting such property ever occurred to the legislature. The course of affairs since may have made it expedient to introduce a new exemption in consideration of property held out of the state by corporate

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bodies; but this is a matter within the province of the legislature, which makes and amends, not of the courts which declare, the law.

4. But, again, the making of any such deduction is impracticable. There is no machinery for it provided in the laws. No such machinery is requisite in the case of an individual, because the assessment in his case is imposed upon his property valued *according to ordinary rules*, and all that is requisite in his case is simply to so value his personal property within this State. Not so in the case of corporations. Their personal estate is not to be valued *directly* at all. It is their stock which is to be valued; and the value of their tangible property is but one of the elements which compose it. The other is the added value embraced in the franchise. The two are blended together inseparably. How are the commissioners to determine what proportion of the value of the capital stock is created by the property mentioned in the schedules of the relators as situated outside of the state?

5. It may be argued that the supreme court of the United States has, in effect, declared that investments in the bonds of the general government are *exempt* from taxation in this state, and must, therefore, even when held by corporate bodies, be deducted by the commissioners from the actual value of the capital as fixed by them; and that it has been decided by the court of appeals that property outside of the state is *exempt* from taxation, and that, therefore, according to the decision of the supreme court, above mentioned, there should be a deduction; but this plausible reasoning cannot safely be followed.

a. The peculiar attitude of the United States supreme court must be considered. Necessarily it is a jealous guardian of the powers and rights of the general government, and it saw that unless such a deduction was made, the government credit could be indirectly taxed. That court does not consider itself the best interpreter of the *intent* of state legislation. The effect of its decision should be limited to just what was

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decided, namely, that in no form, directly or indirectly, are government securities to be burdened by state taxation. It was a violent decision that there must, *quocunque modo*, be a deduction on account of the government stock (*The People ex rel. Bank of Commerce* agt. *The Commissioners of Taxes*, 40 Barb., 334; *The People ex rel. The Lockport Bank* agt. *The Board of Education*, 46 Barb., 588).

b. It is also to be considered that the arrangements of state taxation are matters of state concern only, and the federal courts have nothing to do with them (*The People ex rel. Bank of Commerce* agt. *The Commissioners* [on appeal], 26 N. Y., 163).

c. The decision of the court of appeals, in the *People ex rel. Hoyt* agt. *The Commissioners of Taxes* (23 N. Y., 224), is a decision not that this state *could* not impose a tax for property situated beyond its limits, but that the *general* scheme of taxation adopted did not, in its *intent*, embrace such property. As that was the case of an assessment against an individual, the machinery of taxation interposed no obstacle to carrying out this supposed legislative intent. But the decision is not applicable to the case of a corporation. The legislative arrangements for taxation in such cases do not make any provision for exempting personal property outside of the state; and it must, therefore, be assumed as the legislative intent that no such special exemption should be made.

6. The particular exemptions claimed are for property set forth in the schedules D, E, F and G. Something more definite than these schedules, and what is said about them in the affidavit, is requisite, in order to make it appear that the relators have been denied the benefit of the legal rights which, according to their view, they possess.

a. For aught that appears, New York is the *home port* of all the steamships named in schedule D, and if so, they are certainly taxable here (*The People ex rel. The U. S. and Brazil Steamship Co.* agt. *The Commissioners*, 48 Barb., 157; *The People ex rel. Hoyt* agt. *The Commissioners*, *ubi supra*).

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b. As to those items contained in schedule G, consisting of moneys in the hands of foreign bankers and others, they may be nothing but ordinary debts, which are taxable in the domicile of the person to whom they are due.

7. It is quite apparent that the relators have pretty much succeeded in escaping the taxation everywhere else which they are seeking to avoid here. They do not pretend that they are taxed anywhere else for their enormous property invested in steamers. They do, indeed, say that they are taxed in San Francisco for whatever property they have there, but they do not condescend to give us any figures, which they lavish so freely in other places.

8. In the views we have thus far taken, the point so much discussed in several cases in the books, and as to which conflicting judicial opinions have been expressed, namely, whether assessments of the capital stock of corporate bodies are really assessments of their personal property or of the franchise, has been deemed not material, and as rather a controversy about words. In the view taken in these points, the intent of the legislature has been to indirectly impose a tax upon the property of corporations, *as blended with and affected by the franchise*. But if anything turns upon this point thus disputed, the weight of reason and of authority in this state favors the conclusion that the tax is imposed upon the capital stock without reference to the property in which it is invested.

a. Mr. justice DENIO was of the opinion that until the act of 1857 the tax was imposed rather upon the franchise, without reference to the property in which the capital was invested; but that the act last mentioned changed the principle (*see his opinion in the People ex rel. agt. The Commissioners of Taxes*, 23 N. Y., 192).

b. Mr. justice NELSON, of the United States supreme court, in the *Bank Tax case*, already cited, expressed a similar opinion.

c. Mr. justice COMSTOCK, in *The People ex rel. The Bank*

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of the Commonwealth, was of opinion that the tax was always imposed in respect of the property.

d. But four of the judges, in the case last mentioned, are believed to have entertained the opinion that the tax was always imposed rather on the franchise and without reference to the corporate property; and the general term of this district, Mr. justice SUTHERLAND delivering a very able opinion, took the same view (*The People* agt. *The Commissioners of Taxes*, 40 Barb., *ubi supra*).

9. If this view, more extreme than the one we have endeavored to maintain, be adopted, the conclusion certainly follows that the claim of the relators has no foundation.

10. Upon the claim that the commissioners should have deducted the indebtedness of the company, the decision in *The People* agt. *Ferguson* (38 N. Y., 89) should be noticed.

a. This case seems to have been argued upon the concession that all indebtedness of a corporate body should be deducted from the value of the capital in making the assessment, the only question being whether a contingent liability should be held equivalent to an indebtedness; and, consequently, the point now under discussion was not argued at all. The truth is, that the deducting of debts from the value of the personal estate has nothing to do with assessments against corporations. It was originally introduced and always applicable only in respect to assessments against individuals (*The People* agt. *The Board of Education of Lockport*, 46 Barb., 588).

b. The case seems to have received very little attention, either from the counsel or the court. But one judge appears to have considered it, and he seems to have been under the influence of misapprehension. It did not occur to him that the market value of the stock of the corporation depends, among other things, directly upon the amount of its indebtedness, and, consequently, that when the capital stock is valued by a reference to the market price, its indebtedness is, in fact, already deducted.

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XVIII. We make the distinct point, that in assessing the personal estate of a corporation, by taking, according to the statute, the *actual value* of its capital stock, its indebtedness is, in fact, deducted, and the claim for another deduction on the same account is an absurdity.

LASTLY. The writ of *certiorari* should be quashed or dismissed for the reason stated in the first of the above points. If the merits are considered, there should be judgment in favor of the respondents, with costs.

INGRAHAM, *P. J.*—The decision of this court in the several cases of the railroad companies,* disposes of the questions raised in this case in regard to the indebtedness of the company. This case differs from those referred to, in the fact that no valuation of the stock was furnished by the officers of the company.

The commissioners, as in the other cases, valued the stock at its par value, \$20,000,000.

The officers of the company objected, and furnished a statement of the property and debts of the company, and thereupon the valuation of the capital stock was reduced one-half, \$10,000,000. From this was deducted the value of their real estate \$2,091,073, United States bonds held by them, \$100,000, and Panama railroad stock held by them amounting to \$1,000,000, and the commissioners assessed the value at the balance, \$6,808,937.

In regard to the valuation of the stock, the commissioners, not having any sworn evidence before them, were justified in ascertaining such value from other sources, as they do in valuing real estate. In the *People agt. Commissioners of Taxes* (23 *N. Y.*, 192, 194), DENIO, J., says: If it were alleged that this (the nominal capital) did not represent its true value, it would be their duty to look at its market price, and, if necessary, to ascertain the character and worth of the securities in which its funds had been invested. The

* See *Dry Dock & East Broadway R. R. Co., etc., agt. Cunningham, etc.*, 45 *How.*, p. 458.

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market price of the shares would, ordinarily, furnish a practical test, but either the assessor or the tax-payer would have a right to examine and have an estimate made of the value of the securities.

I may add to this, in addition, it would equally be the duty of the commissioners to consider the indebtedness as reducing the actual value of the stock, and form their estimate on that basis.

The valuation was reduced one-half, a sum much larger than any indebtedness of the company, and there is no ground for supposing the commissioners did not consider such indebtedness in making the assessment.

The only question, therefore, which remains, is whether the company was not entitled to a deduction of the amount of their personal property which was permanently located without the state.

The proof shows that the greater portion of the personal property of the company was permanently located beyond the limits of the state of New York; that the ships are used exclusively in the navigation of the Pacific ocean, and never touch at any port in this state.

The proof also shows a large amount of coal for the use of the vessels, also out of this state in a foreign country; also vessels in process of construction abroad, to be used in the Pacific ocean, and that the company is taxed on all its property in California.

I am of the opinion that this property comes within the exemption of the statute. The general law as to taxation declares what shall be the subject of taxation. All lands and all personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified (1 R. S., 387).

In the case of *The People ex rel. Hoyt agt. The Commissioners of Taxes* (23 N. Y., 224), the court of appeals construed this statute as not allowing the personal property of an individual in another country to be liable to taxation.

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This rule was, at that time, applied alike to individuals or corporations, and the effect of it was to exempt from taxation all personal property belonging to an individual or to a corporation permanently located out of this state.

That still remains the law of the state; and the personal property of an individual or of a corporation, permanently located abroad, is no more subject to taxation here than the real estate, unless changed by the provisions of the act of 1857, page 1.

This provides that the capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, &c., shall be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county. The question naturally arises, what is exempted by law? The answer is, all property, whether real or personal, having its location out of this state, is not subject to taxation, and is not, therefore, within this statute.

The intent of the legislature to deduct from the valuation the estate of individuals, personal property not within this state, rests on the same foundation as that of real estate abroad. That it was intended to except from the assessment of stock, property not subject to taxation, appears also from the fact that while it directs the stock to be valued, it excepts property that is exempt and provides for the assessment of the residue; such property is not to be valued as part of the capital stock of the corporation, nor is there any propriety in such an assessment.

The property owes nothing to the state for protection, while it pays taxes abroad in the country where it is located and used.

In the *People agt. Commissioners of Taxes* (23 N. Y., 192, 223), DENIO, J., says: It would be equally their duty to inquire whether any of this property, into which the capital had been converted, was exempted by law from taxation. Again he says: "whether such exempt property is found in

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the hands of an individual or in the possession of a corporation taxed upon the actual value of its capital, the rule is the same; the exempt property is to be deducted from the aggregate valuation and the tax imposed upon the residue."

The only difficulty which suggests itself is, that the commissioners may have omitted to include in their valuation of the stock the value of the property abroad; and, therefore, they should not be required to deduct it now.

The rule in regard to the valuation of property is different from the inquiry as to indebtedness. In the one case the property is valued, in the other the indebtedness diminishes the value.

If the commissioners had not valued the property abroad, they should have so returned the fact. On the contrary they say they ascertained the actual value of the capital stock of the said company to be the sum of \$10,000,000, and deducted therefrom the items before mentioned.

From this return no other conclusion can be formed than that the commissioners valued all the property of the corporation in valuing the stock, and made no allowance for exempt property, except what was deducted; in this we think they erred and that the relators are entitled to relief.

It does not, however, follow that the relators are entitled to a deduction from this assessment of the whole amount at which they value the personal property out of the state. The only order that can be made, is to set aside the assessment and refer the same back to the commissioners to correct the assessment by deducting the value of the personal property out of the state, unless the commissioners elect to accept the amount admitted by the relators, in schedule C, to be the sum at which they should be assessed. In that case the assessment will be corrected and affirmed for that amount.

E. L. FANCHER and JOHN R. BRADY, JJ., concurred.

Homburger agt. Homburger.

N. Y. SUPERIOR COURT.

ADELAIDE HOMBURGER agt. JOSEPH HOMBURGER.

Where there is no sufficient evidence that the husband had the venereal disease, or that he communicated it to his wife, she cannot obtain a divorce from him for adultery without further testimony.

At Special Term, December, 1873.

MOTION for confirmation of report of referee and for judgment of divorce.

FREEDMAN, J.—The evidence is insufficient. There is no testimony that the defendant had the venereal disease, or that the same was communicated to plaintiff by the defendant. In *Collett agt. Collett* (*Jud. Com. of Privy Council, Wadd. Dig.*, 38, *overruling 1 Curt. Ec.*, 678, 686), it was distinctly held that the adultery of the husband cannot be inferred from the mere fact of the wife's being tainted with venereal disease, although she herself is not even suspected of adultery; that the existence of such disease in the wife is consistent, 1, with the adultery of the husband; 2, with her own adultery; and 3, with accidental communication of it; and that where there is no proof of the husband's having been himself diseased at the time specified in the libel, it will not be ascribed by preference to the first of these causes, even though it appears that at a former time he had infected his wife. To the same effect is *Ferguson agt. Ferguson* (3 *Sandf.*, 307).

The case is referred back for further proof.

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SUPREME COURT.

MINTON A. GOODENOUGH, appellant, agt. WM. H. SPENCER,
respondent.

A transfer of property made by a debtor for the purpose of withholding it from the satisfaction of the lawful demands of his creditors is a misdemeanor under the statutes of New York, and the person who receives as well as the one who transfers the title are both guilty.

No attorney or counsel has the right, in the discharge of professional duties, to induce his client, by his advice, to the violation of the laws of the state, and when he does so he is implicated in his client's guilt, and the court will not allow him to be profited by his unlawful conduct.

The relation existing between attorney, counsel and client considered.

It will, however, maintain the validity of a transfer made to an innocent third party, provided the title is perfect ; but if a condition set forth in the bill of sale suggests to the vendee a doubt as to the perfection of the title, then he must bear the consequences of his neglect in the examination of the title.

First Department, January, 1874.

THE evidence in this action showed, and the referee found, that on the first day of March, 1870, the defendant executed and delivered unto Samuel Stevens, then his attorney and counsel in legal proceedings, a bill of sale of household furniture, horses, cattle, sheep, wagons, harness, grain and hay, then being in, upon and about his dwelling-house and farm, situated in the town of York, Livingston county, and state of New York. The consideration recited in the bill of sale was \$5,000, paid by the defendant to him by certain counsel fees and moneys for legal services due or to become due in certain matters at the date of the bill of sale in the hands of the vendee, including suits at law and other matters of adjustment, counsel and advice, disbursements and moneys paid,

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laid out and expended, costs and charges and other good and valuable consideration. The property included in the bill of sale was of the value of \$5,000; and, at the time of its execution and delivery, the defendant owed the vendee not exceeding the sum of \$400; but that sum was found to form no portion of the actual consideration for which the bill of sale was given. The defendant was then in embarrassed circumstances, and was about to be examined in supplementary proceedings taken on a judgment recovered against him. And, at the suggestion of the vendee, his attorney and counsel, he executed and delivered the bill of sale to him, in order to prevent the property referred to in it from being appropriated by his creditors to the payment of their debts, upon the agreement on the part of the vendee that he would transfer it again to the defendant after his financial difficulties had been overcome. After the execution and delivery of the bill of sale, the defendant remained in the undisturbed possession of the property mentioned in it, as it was understood between the parties to it that he should, at the time when it was delivered, and used and enjoyed it as his own.

On or about the 12th day of August, 1870, Samuel Stevens, the vendee in the bill of sale, procured from the plaintiff the sum of \$2,500, and delivered him a written assignment of the bill of sale, accompanying the bill of sale itself. This assignment was absolute in its form, but the plaintiff, under date of the 13th of August, 1870, entered into an agreement with Stevens, by which he agreed to assign the bill of sale back to him for the sum of \$3,000, to be paid on or before the 1st day of November, 1870.

During the defendant's examination in the supplementary proceedings, he testified that he had conveyed his personal property to his counsel, Samuel Stevens, for services. Before the plaintiff took the assignment of the bill of sale, he was informed that the defendant had given that testimony. But it appeared on the trial, according to the conclusion of the referee, that the statement was made under the suggestion

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and advice of the defendant's attorney and counsel, the vendee in the bill of sale. Before the assignment of the bill of sale, the plaintiff was advised by his own counsel that he could safely purchase the same, and by doing so would acquire title to the property described in it. The plaintiff took the assignment of the bill of sale, relying on that advice, and upon the evidence given concerning it on the supplementary examination, and the statement contained in the bill of sale itself, believing that by doing so he would acquire a good title to the property described and mentioned in it. At the time of the assignment it was orally agreed between the plaintiff and Stevens that the plaintiff should not interfere with the property in the bill of sale for the period of sixty days. And the plaintiff was also informed by Stevens that he was the defendant's attorney and counsel; that he had been employed by him in various suits, and other matters, for which the defendant owed him a large sum of money, and that the bill of sale was given for such services, and was regular and proper. He also informed the plaintiff that the property was in the possession of the defendant at his farm or place in Livingston county, and had continued in his possession since the execution of the bill of sale. All this information was communicated to the plaintiff before he took the assignment of the bill of sale. Proof was also given from which it was found that the plaintiff had no knowledge or notice of the real state of the transaction, as it existed between the defendant and his attorney and counsel. The defendant refused to deliver the property to the plaintiff, and this action was brought for the recovery of its possession. The referee reported in favor of the defendant, and from the judgment entered on the report the plaintiff appealed.

D. McMAHON, *for appellant.*

THERON G. STRONG, *for respondent.*

DANIELS, J.—Although the character of the transaction which resulted in the execution and delivery of the bill of

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sale from the defendant to his attorney and counsel was in dispute upon the trial, the evidence was sufficient to justify the referee in the conclusion he adopted concerning it, and for that reason that conclusion must now be accepted as exhibiting the transaction in its true light. It was, in brief, a transfer made by an embarrassed client to his attorney and counsel, under the advice and suggestion of the latter, without any actual consideration, but for the purpose of having the property held by him for the sole use and enjoyment of the defendant so long as it was in danger of being seized by his creditors for the payment of their debts; and after that danger had been successfully avoided, restoring the formal title again to the defendant, and that intention appears to have been observed until the vendee undertook to transfer the property to the plaintiff for the consideration he received for doing so on the assurance that the bill of sale was regular and proper.

By the statutes of the state a transfer of property made by a debtor for the purpose of withholding it from the satisfaction of the lawful demands of his creditors is prohibited; and the person who receives as well as the one who transfers the title for the promotion of such a design, are both rendered so far criminal as to be guilty of a misdemeanor (3 *R. S.* [5th ed.], 971, § 3). In the consummation of this transaction both parties to it involved themselves in the guilt of this offense, and the vendee cannot shield himself from its consequences by reason of the circumstance that its commission arose out of the advice sought for his protection by an embarrassed or insolvent client. No attorney or counsel has the right, in the discharge of professional duties, to involve his client by his advice in a violation of the laws of the state; and when he does so, he becomes implicated in the client's guilt, when, by following the advice, a crime against the laws of the state is committed. The fact that he acts in the capacity and under the privileges of counsel, does not exonerate him from the well-founded legal principle which renders all persons who

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advise or direct the commission of crime guilty of the crime committed by compliance with the advice or in conformity with the direction which may be given.

But while both the attorney and his client may be rendered criminally guilty in such a transaction, the law does not allow the attorney to profit by it where it results in an apparent advantage to him from compliance with the advice given by him. The relation existing between attorney and counsel and client is one of trust and confidence, placing the interests and rights of the client very much under the guardianship and control of the counsel, and liable to abuses resulting in serious and lasting injury to the client. The law regards the client as very much under the influence and control of the attorney and counsel, while the ordinary professional relation exists between them, and for that reason the conduct and acts of the latter are closely watched and scrutinized. If he bargains with the client, while the relation exists, to his own advantage and the detriment or prejudice of the client, the law attributes the result to the use made of his undue influence over the conduct of the client; and in the absence of satisfactory evidence of good faith on the one part, and entirely voluntary action upon the other, sets aside and annuls the transaction. So decided are courts of justice in the observance and enforcement of this principle that the attorney or counsel will not be permitted to retain the fruits of even an unlawful contract, where, under ordinary circumstances, no relief would, on account of the illegality of the enterprise, be awarded to either party. Where one party, through the means of an unlawful agreement, acquires the property of another, the law regards them as equally in fault, and will do nothing for the redress or protection of either side. But when that advantage is secured by an attorney or counsel from his client, the parties are not considered as being equally in the wrong. The law then regards the client as being drawn into the violation of its provisions through the controlling influence of his attorney and counsel over him, and

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for that reason intervenes for his protection. Hence, in a transfer like that made by the defendant to his attorney and counsel by the bill of sale which was executed and delivered in this instance, although both parties to it violated the law, the defendant was not equally in the wrong, and the transfer will be annulled for the purpose of relieving him, if that can be done without injury to an innocent purchaser (*Ford agt. Harrington*, 16 *N. Y.*, 285; *Freelove agt. Cole*, 41 *Barb.*, 318; *Evans agt. Ellis*, 5 *Denio*, 640; *Howell agt. Ransom*, 11 *Paige*, 538).

But that relief will not be carried so far as to disturb the rights of an innocent third person who, in good faith, may have been induced to part with his money or his property, relying upon the title the attorney and counsel had the apparent right and power of transferring. The rule in that case being that, where one of two innocent persons must suffer by the fraud or misconduct of a third, the loss shall be borne by him who conferred upon the wrong-doer the means of deceiving persons honestly dealing with him (*Rawles agt. Deshler*, 3 *Keyes*, 572; *Whittick agt. Kane*, 1 *Paige*, 202, 208).

Under this principle, even though the transfer of the defendant's property to his attorney and counsel would be at once set aside as between them, the redress could not be so far extended as to annul the plaintiff's title, if he had been entirely justified in his conclusion that the defendant had parted with all his rights and interest in the property sold. But he was not, for he omitted one important indication of the continued existence of those rights arising out of the circumstance that the property still remained in the defendant's possession; and in addition to that he was required to stipulate that it should continue in that condition for the period of sixty days after the assignment of the bill of sale to him. These circumstances were not consistent with the existence of an indefeasible title in the person the plaintiff dealt with. They unmistakably pointed to the fact that the defendant had, or claimed to have, some interest in or right

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to control the property his vendee proposed to sell, notwithstanding the recitals in the bill of sale, the assurances the plaintiff received, and the evidence the defendant had previously given; and the plaintiff should have applied to the defendant for the information which these circumstances admonished him might be given if he had designed to follow the dictates of reasonable prudence, and in that manner to guard himself against loss arising out of the purchase of another person's property. The fact that he failed to make the inquiry the defendant's possession suggested the propriety of, is sufficient to render him responsible for all the information which such an inquiry would have secured; and that affects the title he acquired with all the infirmities it had in the hands of the man from whom he obtained it (*Williamson* agt. *Brown*, 15 *N. Y.*, 354, 361, 362; *Grimstone* agt. *Carter*, 3 *Paige*, 421; *Reed* agt. *Gamon*, 50 *N. Y.*, 345, 349, 350; *Baker* agt. *Bliss*, 39 *N. Y.*, 70).

Under this defect in the plaintiff's title he stood precisely where his assignor did before the assignment, holding it in subordination to the defendant's right to annul the sale as the result of the undue influence his attorney and counsel exercised over him in procuring it.

The learned counsel for the plaintiff is entirely right in his position that the admissions and declarations of Stevens in contravention of his title were not admissible as evidence on the trial of this action; and if any of the oral or written statements made by him and received during the trial had the least bearing on the conclusions arrived at by the referee, the judgment would necessarily be reversed. But they did not, for they were mostly on immaterial inquiries having no influence by the way of proof on any of the material facts in the case. The most important of all was the direction or suggestion to the defendant himself that he should return to Genesee and instruct his counsel there to have the assignment set aside at once as it was of no value whatever, as he had never taken possession of it. The only fact this statement

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had any tendency to prove was the circumstance that Stevens or the plaintiff never took possession of the property sold, and that was in no way disputed in the case. It was not pretended by any one that either Stevens or the plaintiff ever had possession of the property. On the contrary, the fact was beyond dispute the other way.

There was no impropriety in excluding what was said about not putting the bill of sale upon record, because it was in no sense a security while it stood in the hands of Stevens. If it was valid in his hands at all, it was as an absolute title. As it cannot be maintained in that form, there could be no materiality in any reason suggested for not putting it upon record. The referee has negatived the idea that it might have been designed as a security; for that reason it was not such an instrument as the law required or allowed to be placed upon record. The case presents no ground on which the judgment can be properly disturbed. It should therefore be affirmed with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

Nelson agt. Luling.

N. Y. SUPERIOR COURT.

PETER NELSON, plaintiff and appellant, agt. CHARLES LULING, ISAAC TAYLOR, FRANCIS W. G. BELLWS and HENRY C. CALKIN, defendants and respondents.

The plaintiff brought his action against the defendants as incorporators and directors of a company formed pursuant to the general laws of the state for ocean steam navigation, under the name of "The New York and Bremen Steamship Company," charging them, first, with fraudulently and corruptly combining to organize said company for the purpose of deceiving such of the public as might be induced to become stockholders therein; and secondly, with inducing, by false and fraudulent representations, the plaintiff to purchase twenty-seven shares of the capital stock of the par value of \$100 each.

Held, that the facts and circumstances shown by the plaintiff, including his own evidence, when considered in its entirety, fell quite short of establishing that the New York and Bremen Steamship Company was organized by the defendants with the intent of deceiving and cheating the public or the plaintiff. Fraud in such a case cannot be presumed, but must be affirmatively established.

Held, also, that before the plaintiff can recover for alleged false representations made to him at the time of subscribing for the stock, it is essential that he should satisfactorily prove that the representations were fraudulently made; that they were not only false in fact, but that they were made with the intent to deceive. This intent may be inferred from evidence showing that the party making them knew of their falsity at the time, or, at least, professed knowledge of their truth, when, in fact, he was conscious that he had none. But, in either case, falsehood uttered with intent to deceive is essential. Plaintiff's proof was not only deficient upon the question of fraudulent intent, but also upon the question of the falsity of the representations as to existing facts.

General Term, November, 1873.

Before BARBOUR, C. J., MONELL and FREEDMAN, JJ.

APPEAL from judgment.

Nelson agt. Luling.

EDWARD D. McCARTY & GEORGE W. VAN SLYKE, *for appellant.*

T. C. T. BUCKLEY, & JAMES K. HILL, *for respondents Luling, Taylor and Calkin*

JAMES P. LOWERY *for respondent Bellows.*

By the Court, FREEDMAN, J.—This is an appeal by plaintiff from a judgment entered upon the dismissal of his complaint at a trial before the court and a jury. The action was brought against the defendants as incorporators and directors of a company formed pursuant to the general laws of the state of New York for ocean steam navigation, under the name of "The New York and Bremen Steamship Company," and the complaint charged them, first, with fraudulently and corruptly combining to organize said company for the purpose of deceiving such of the public as might be induced to become stockholders therein; and secondly, with inducing, by false and fraudulent representations, the plaintiff to purchase twenty-seven shares of the capital stock of the par value of \$100 each.

The evidence showed that the plaintiff was originally a stockholder, and creditor for work done, of a steamship company called "The North American Lloyd," which owned three steamships named, Atlantic, Baltic and Western Metropolis, for which the sum of \$965,000 had been paid or secured to be paid. No one of the defendants was a stockholder in this company, except Calkin; but the Pacific Mail Steamship Company held a first purchase-money mortgage on the Atlantic and Baltic, and the defendant, Charles Luling, on behalf of his house here and some of his correspondents abroad, was a large creditor, and as such held subordinate mortgages upon the three steamships. In the fall of 1866, in consequence of the German war, the company failed, with liabilities amounting to about \$1,400,000, and Calkin was appointed receiver. Among the said liabilities was one of \$5,000 to the plaintiff, which was entirely unsecured.

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Luling and the Pacific Mail Steamship Company then determined to foreclose their respective mortgages, in order to acquire a title which would be not only absolute upon its face, but would also be free and clear from the claims of the general creditors of the North American Lloyd. This was accordingly done, and the three steamships were sold and bought in by the defendant, Taylor, in their interest and on their behalf. Their further design, in doing this, was to form a new company, into which the said steamships were to be put, and the shares of which were to be divided between Luling and the Pacific Mail Steamship Company, in certain proportions, as provided by a written agreement entered into for that purpose.

In pursuance to such agreement the New York and Bremen Steamship Company was formed with a capital stock of \$1,000,000.

This stock was subscribed for by seven persons, as follows: Francis Skiddy, \$5,000; Charles Luling, \$140,000; F. W. G. Bellows, \$5,000; John T. Hanneman, by Charles Luling, \$5,000; Harvey C. Calkin, \$5,000; James K. Hill, \$5,000; Isaac Taylor, \$835,000. They met and they executed, and on the 24th of January, 1867, filed a certificate of incorporation as required by statute, and the defendant, Taylor, was elected president and treasurer.

To this company Taylor offered to sell the three steamships in question for \$1,000,000 in cash, and the assumption, by the Company, of the payment of the claims held by Luling and his correspondents against the North American Lloyd and the steamer Western Metropolis, less \$150,000, subscribed by Luling for himself and Hanneman for the stock of the new company. This offer was accepted by the board of directors of the company, and Taylor, as treasurer, was directed to pay to himself, individually, the said sum of \$1,000,000, upon the receipt of a conveyance of the ships. The conveyance was made, and the manner in which the subscriptions were paid in and the money paid over to Taylor was as fol-

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lows : The Pacific Mail Steamship Company, undertaking to pay for the subscriptions of Taylor, Calkin, Skiddy and Bellows, handed to Taylor, on four separate occasions, between the 30th of January and the 20th of February, 1867, checks to the aggregate amount of \$850,000. As each check was received, it was deposited by Taylor in bank to the credit of the company, and thereupon a check for an equal amount was drawn by Taylor, as treasurer, to his own order, and that was indorsed and delivered by him to the Pacific Mail Steamship Company. Luling undertaking to pay for his subscription and that of Hanneman and Hill, on the 23d of January, 1867, handed to Taylor a check for \$150,000, which was also deposited by Taylor in bank to the credit of the company, and out of the proceeds of which \$110,000 were paid to Duncan & Sherman, in satisfaction of a mortgage held by them on the Western Metropolis, which, as between the company and himself, Luling was bound to satisfy. The remaining \$40,000 were retained to work the line.

It was also a part of the original arrangement under which the New York and Bremen Steamship Company was gotten up, that any creditor of the North American Lloyd, who desired so to do, might acquire an interest in the new company by the purchase of stock at fifty cents on the dollar and the transfer of his claim. The plaintiff, as such a creditor, elected to avail himself of this provision to the extent of taking \$2,700 worth of new stock. In order to give that amount, Taylor, who held the stock subscribed for by him in the form of a certificate issued to him as trustee, surrendered the same and had new certificates issued in place thereof. One of these, representing plaintiff's stock, was issued directly to the plaintiff on the 20th of March, 1867, and he paid for it by giving Taylor a check for \$379, his note for \$1,000, payable six months after date, and a transfer of his old claim.

On the 23d of March, 1867, a second certificate was filed, which had been executed by the defendant, Taylor, as president, and by the defendants Luling, Bellows and Calkin, as

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a majority of the trustees of the New York and Bremen Steamship Company, and which stated that the whole of the capital stock of said company had been paid in.

On the 31st of March, 1867, the company, in pursuance of the terms of its purchase, gave a mortgage to Charles Luling & Co. on the three steamships, to secure the sum of \$330,126.67, being the balance due to Luling and his correspondents from the North American Lloyd, with the \$150,000, the amount of their stock subscriptions, deducted.

The New York and Bremen Steamship Company did not prosper, and the Pacific Mail Steamship Company, refusing to furnish any more means to carry on the line, it was, on the 27th of February, 1868, resolved to wind up its affairs. All current expenses and debts having been paid, and there being no creditor outside of the parties who had gotten it up, the company ceased to do business. The steamships were sold, and the proceeds applied to the payment of the mortgage held by Luling, and all parties lost what they had put in.

There was no proof that a prospectus had ever been issued, or that subscriptions for the stock had been solicited or authorized by the company to be solicited, or that any stock was sold to outside parties. The whole arrangement seems to have been a scheme, by the two heaviest and preferred creditors of an insolvent corporation, to reorganize it upon the basis of the property to be saved, and the other creditors had their election to come in upon certain conditions. Now, whether these conditions were fair or otherwise, whether in the organization of the new company the requirements of the law of this state as to the payment of the capital stock in cash were really complied with or evaded by a mere technical performance, whether the directors of the new company observed reasonable care and caution in the management of the affairs of the company, or were guilty of recklessness, extravagance and excessive liberality in purchasing the three steamers at the price paid therefor, and in assuming the payment of Luling's claims against the same, or whether the

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creditors of such new company, if any existed, could or could not question the validity of the mortgage subsequently executed to Luling, under which the entire property was finally swept away, are questions which do not necessarily control the final decision of this case.

They fail, standing alone, to show fraud, while it is upon fraud that plaintiff relies as his cause of action. They are, therefore, mere circumstances to be considered and weighed with the other testimony in the case. But plaintiff's evidence, when considered even in its entirety, fell quite short of establishing that the New York and Bremen Steamship Company was organized by the defendants with the intent of deceiving and cheating the public or any of the creditors of the North American Lloyd by palming off upon them worthless shares of its stock. Fraud, in a case like this, cannot be presumed, but must be affirmatively established. The certificate which stated that the capital had been fully paid in was filed after plaintiff had completed the purchase of his stock, and consequently he cannot have been misled by it.

The only remaining inquiry, therefore, relates to the representations, if any, that were made to the plaintiff at the time he took the stock. His testimony upon this point shows that in relation to this matter he had no conversation with the defendants, Luling and Bellows, or any one in their behalf, and the complaint was therefore properly dismissed as against them.

As to Calkin and Taylor, plaintiff showed that the first intimation of the formation of the new company which he received came from Calkin, who informed the plaintiff that he, the plaintiff, could come in and convert his old claim into new stock by a payment of fifty cents on the dollar. The plaintiff inquired what Calkin thought about it and the latter replied: "It is a good company; we have formed it; the capital is all paid in; you go to No. 40 Broadway to Isaac Taylor and get new stock for your old claim and you will get the work of the new company. It is going to be the biggest

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company in New York." Plaintiff thereupon did go to the place named and there told Taylor what Calkin had said, and Taylor replied: "That is so; the capital stock is all paid in; everything is all right and we will go on swimmingly." On his cross-examination plaintiff admitted that he had no doubt that whatever Calkin said to him, he, Calkin, believed to be true; and that whatever Calkin or Taylor told him, he, the plaintiff, understood to be mere matter of opinion as to the condition and prospects of the company. In this connection it is to be observed that the defendant, Taylor, who had been called as a witness on behalf of the plaintiff, testified on his cross-examination that at the time of the organization of the company he believed that the enterprise would prove a success. For such representations no action lies, for, before a plaintiff in an action like this can recover, it is essential that he should satisfactorily prove that the representations were fraudulently made; that is to say, that they were not only false in fact, but that they were made with the intent to deceive. This intent may be inferred from evidence showing that the party making them knew of their falsity at the time, or at least professed knowledge of their truth, when, in point of fact, he was conscious that he had none. But in either case falsehood uttered with intent to deceive is essential. The presumption is in favor of innocence, and on that account the intent or design to deceive the plaintiff must be affirmatively made out by evidence (*Wakeman agt. Dalley*, 51 *N. Y.*, 27; *Chester agt. Comstock*, 40 *N. Y.*, 575, 576 [note]; *Marsh agt. Falker*, 40 *N. Y.*, 562; *Weed agt. Case*, 55 *Barb.*, 547). Of course such intent or design can only be proven by facts and circumstances, but one of these must clearly show willful falsehood. When that is brought home the other facts become tainted by it and may all be construed in the light which the intentional falsehood casts upon them. But without it the presumption of fair dealing will control. The statement that the capital stock had been all paid in was at least technically true, and the other statements involved mere

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matters of opinion. Plaintiff's proof was, therefore, not only deficient upon the question of fraudulent intent, but also upon the question of the falsity of the representations as to existing facts. Moreover, it fully appeared by Taylor's testimony, and without contradiction by the plaintiff, that Taylor told and explained to the plaintiff the organization of the company; that plaintiff knew as much about it as Taylor did; that, among other things, Taylor told plaintiff that the money given by the Pacific Mail Steamship Company had been returned, and that under the circumstances the company did not have a working capital; and finally it appeared that plaintiff was acquainted with the trade and with steamships and their value; that the three steamers in question were really worth over \$500,000; that the plaintiff by the purchase of his stock and as part of the bargain for its purchase secured the painting of said steamers; that he performed between \$4,000 and \$5,000 worth of work on them; that he paid his note of \$1,000 with bills for part of such work, and that he received his money for the balance.

Upon the whole case it is therefore impossible to arrive at the conclusion that the plaintiff was induced to purchase the stock by means of and in reliance upon representations which were false and fraudulent within the true and legally established meaning of the words.

The complaint was properly dismissed against all the defendants; and as the other exceptions in the case cannot affect the final result, the judgment appealed from must be affirmed, with costs.

BARBOUR, C. J., and MONELL, J., concurred.

Holloway agt. Stephens.

SUPREME COURT.

THOMAS HOLLOWAY, appellant, *v.* BENJAMIN F. STEPHENS,
respondent.

In estimating damages resulting from repudiation of contract, a referee must base the same upon proof of performance, on the part of the plaintiff, of the several conditions of his contract, and not upon mere speculation and conjecture.

General Term, December 12, 1873.

APPEAL from judgment for defendant, &c., entered on report of referee.

S. P. NASH and M. B. MACLAY, *for appellant.*

A. J. VANDERPOEL and T. B. ELDRIDGE, *for respondent.*

DAVIS, *J.*—Assuming that the learned referee was entirely correct in finding that Haydock had full power, as plaintiff's agent, to make the several contracts with the defendant, and that the same were free from all fraud and collusion, and had, without fault on defendant's part, been broken by plaintiff, so as to subject the latter to damages, I am yet unable to see any satisfactory grounds upon which the recovery of the very large amount allowed by the referee can be upheld.

The referee allowed as damages for breach of the contracts the sum of \$135,000. It is obvious that he took as the basis of this allowance the estimate of damages given by the defendant himself, as it appears at folio 142 of the case. On defendant's cross-examination (at folio 192 *et seq.* of the case) an analysis of this estimate appears. It seems to have been made upon a total of 217 newspapers—108 dailies, fifty tri-weeklies, and fifty-nine weeklies—and an average of adver-

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tisement of 175 lines to each paper, and an insertion of the same 104 times in each paper, which is once in each week for two years; and, after deducting ten per cent "for probable deductions and failing of newspapers," and a specific sum for postages, a gross aggregate of \$270,710.88 is reached, of which fifty per cent, to wit, \$135,355.44, is declared to be estimated profits which the defendant would have received at the end of two years if the contracts had been fully carried out.

I have not been able to ascertain from the evidence in the case how the aggregate of 217 newspapers was attained. Certainly they are not mentioned in the several contracts. In the principal contract, that of July 25, 1865, schedule A contains the names of but 101 newspapers; the contract of August 21, 1865, but seventeen newspapers; the contract of August 30, 1865, relates to the *La Cronica*, a paper published in the city of New York, and that of June 13, 1865, relates to the *Prensa*, which seems also to be one of the seventeen contained in the contract of August 21. These are the four contracts upon which the referee has predicated his findings as to damages. There is either some confusion of figures in the case which is to me inexplicable, or else the additional papers have been brought in (as is most likely) under the provision of the contract of July 25, which provides that "papers that are not mentioned in this list (schedule A) in Mexico and Central and South America, that may have been in existence twelve calendar months, and do not yet contain Holloway's advertisements, may be added to the above mentioned list, subject to the same orders of insertion and inspection, saving the Island of Cuba."

It nowhere appears in the evidence that such papers were in fact added to the list, nor that notice was given to the plaintiff or his agent that they would be added, and advertisements would be published in them under the terms of the contract. In respect to such papers, the defendant, so far as I am able to discover, put himself in no such position as to be

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under obligations to plaintiff, or liable for any damages to him for failing to make the required publications, nor does he appear to have called upon the plaintiff or his agent to furnish the advertisement, &c., which he wished to have inserted. But however these suggestions may have been obviated in the mind of the referee, it is very clear to me that an important and essential requisite, in its nature of a condition precedent, to a recovery in respect of a large portion, and, indeed, the great majority of the newspapers, was entirely omitted in the evidence.

The contract (of 25th July) contains this stipulation: "And it is distinctly understood and agreed upon by the signer hereof, that the schedule A papers must have been in existence as newspapers twelve months, and that no advertisements must be inserted in them of Holloway's preparations if his advertisement is already therein when offered by said Stephens, or, wanting these two essential points, this contract to be null and void." It will be observed that by the quotation above made from the same contract, this provision is distinctly applied to all papers not mentioned in schedule A, but which may be added thereto as stipulated in that part of the contract.

I am not able to see why the defendant was not bound to prove that the papers in his aggregate of 217, in which he had been prevented from advertising by the plaintiff's repudiation, were such as he would have been entitled by the terms of the contract to have used.

It was upon him to show that they were papers that had been in existence "as newspapers" for twelve months, and that "Holloway's preparations" were not already advertised in them. No such evidence was given. On the contrary it did appear, in respect to several of the papers in which defendant actually published his advertisements, that Holloway's were already there. It seems to me to have been a fatal error to have allowed a recovery of damages, without evidence on those points, upon the estimate made by the party himself.

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I suppose also from the evidence that the 217 papers included the number named in the defendant's list of newspapers (at folio 1628, page 408 of the case) in which publications were actually inserted, the charges for which are embraced in the \$25,717.02 also allowed by the referee. If this be so, it seems to follow that the damages recovered as to those papers have been duplicated to some extent, as the estimate on the whole 217 includes the full term of two years stipulated for by the contract, and consequently also covers the period paid for by the \$25,717.02.

Upon the evidence offered as to the general damages, the measure claimed and allowed was, in my judgment, altogether too speculative and conjectural. There should have been proof of the existence of the newspapers, of their standing as to time, that Holloway's advertisements were not already in them, and that they were ready and willing to insert them as low as the estimated cost of publishing adopted by the defendant in making up his estimate.

It should have been shown, also (since by lapse of time the two years of the contract had long before expired), that the newspapers had been permanent and would have been able to have continued the advertisements for the term stipulated.

I think there must be a reversal of the judgment and a new trial of the issues.

People *ex rel.* Miller agt. Green.

N. Y. SUPERIOR COURT.

THE PEOPLE *on the Relation of* CHARLES E. MILLER agt.
ANDREW H. GREEN, Comptroller, &c., and ABRAM L.
EARLE, Auditor, &c.

The *relator* claimed the balance of an unpaid salary of \$4,820.17 for services as "counsel to the commissioners of taxes and assessments, in the city of New York," for part of the years 1872 and 1873, which the defendants refused to pay.

It did not appear that the *relator's* salary was provided for in any of the appropriations made for those years to the commissioners of taxes and assessments; and the amounts apportioned to that department are required to be specifically applied to the purposes specified therein. The *relator* can have, therefore, no remedy by mandamus; but is entitled to have his claim audited, and a mandamus lies to the auditor to adjust the demand.

Special Term, February, 1874.

Before MONELL, Ch. J.

APPLICATION for a peremptory mandamus.

The *relator* alleged in his affidavit that in November, 1872, he was duly appointed "counsel to the commissioners of taxes and assessments, in the city of New York," under the provisions of the act of May 17, 1869; that he thereupon entered upon the duties of his office, and continued to discharge them to and including the 9th day of May, 1873; that his salary as such counsel was fixed by the board of supervisors at \$10,000 per annum. He further alleged that there was due to him of unpaid salary the sum of \$4,820.17, with interest from November 25, 1872, which Earle, as auditor, has refused to audit, and Green, as comptroller, has refused to pay.

Upon this the comptroller and auditor were ordered to show cause why they should not audit and pay the claim, and

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the comptroller showed for cause that there was no appropriation of money in the treasury to pay said claim.

It was, thereupon, referred to a referee to take proof and report the same to the court.

The evidence taken by the referee establishes the following facts :

In December, 1871, the commissioners of taxes and assessments delivered to the board of apportionment an estimate of the expenses of the commission for the year 1872, as follows :

Four commissioners, at \$10,000 each.....	\$40,000 00
Surveyors, secretary, deputies, clerks, &c.....	167,000 00
	<hr/> \$207,000 00 <hr/>

In April, 1872, the commissioners delivered to the board an estimate of expenses of their department, from May 1st to December 31st, 1872 :

Four commissioners, at \$10,000 each per annum,	\$26,666 67
Surveyors, secretary, deputies, &c., stationery,	
&c.....	136,233 33
	<hr/> \$162,900 00 <hr/>

The board of apportionment, in May, 1872, by resolution, did "apportion and set apart the sum authorized to be apportioned or raised by authority of chapter 444 of Laws of 1871, to and for the various objects and purposes of the government of the city and county of New York for 1872, as hereinafter named," viz., after a number of others :

Commissioners of Taxes and Assessments.

Four commissioners, at \$10,000 each.....	\$40,000 00
Deputies, clerks, &c.....	134,040 00
	<hr/> \$174,040 00 <hr/>

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Of this total sum there remained of the \$40,000 the sum of \$11,146.10, and of the \$134,040 the sum of \$82.13. Nathaniel Sands, one of the commissioners, had not been paid his salary for the year 1872, and the comptroller claims that the balance of \$11,146.10 is still applicable to that claim.

For the year 1873 the commissioners delivered their estimate for the expenses of that year, making an aggregate of \$222,700, which include \$40,000 for commissioners, the balance being for deputies, clerks, &c.

In January, 1873, the board of apportionment apportioned the following amounts for the following purposes, viz. :

* * * *Commissioners of Taxes and Assessments.*

Four commissioners, at \$10,000 each.....	\$40,000 00
Secretary, surveyor, deputies and clerks	118,000 00
	<hr/>
	\$158,000 00
	<hr/>

Of this total sum there remained of the \$40,000 the sum of \$2,423.42. King, one of the commissioners, having died during the year the balance would have been applicable to his successor, had one been appointed. None was appointed.

The whole amount (\$118,000) for secretary, surveyor, &c., had been paid out of the treasury.

Upon the report of this evidence the relator renewed his motion for a peremptory mandamus.

Mr. W. C. TRULL, *for the relator.*

Mr. ANDREWS, *for the comptroller.*

MONELL, *Ch. J.*—It was conceded by the respondent's counsel that the relator had a legal claim to be paid for his services, as counsel to the commissioners of taxes and assessments. He was appointed by competent authority; his salary was paid by the board of supervisors; and he had performed the duties assigned to his office. Nor was it questioned that

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a mandamus would lie to compel the payment of the claim, if the disbursing officer has funds in his possession, or under his control, which he is authorized to apply to the purpose.

He is a public officer and subject to the mandatory writ, when there is a clear legal right to payment (*People ex rel. Adsit agt. Allen*, 1 *Lans.*, 248; *People, &c., agt. Allen*, 42 *N. Y. R.*, 404.)

The defense interposed in this case is that there are no funds in the treasury to pay the claim. In other words, that there is no appropriation, out of which the comptroller is authorized to take the money.

That there is no appropriation applicable to the payment of the claim is a complete defense to the motion (*People agt. Burrows*, 27 *Barb.*, 89; *S. C.*, affirmed, 17 *N. Y. R.*, 235). It may not be to an *action* against the city.

The question, therefore, to be examined is, whether there is any appropriation, out of which the comptroller is authorized to make payment.

The relator claims that the unexpired balance of \$11,146.10, of 1872, and of \$2,423.42, of 1873, are each applicable to his demand. That must depend somewhat at least upon whether the appropriations for these years were general and not specific. If they were merely appropriations of sums of money for the expenses of the department generally, then it is probable that the comptroller would be authorized and bound to pay out of those appropriations, without discrimination, any and all legal claims of the department, so long as any portion of the appropriation remained. He would have no right to make specific apportionments or set apart special sums for particular officers or persons in the department, and then make such separate appropriations the basis of his refusal to pay other legal claims against the general fund.

On the other hand, if such specific and separate appropriations have actually been made, not by the comptroller but by a competent power behind him, the comptroller has no right whatever to divert them, or any part of them, from such

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specific and separate purpose. So far salaries and compensation, separately designated in the appropriation, must be protected in the treasury for the person or persons occupying the offices to which the salary or compensation is attached. It would not only be unjust towards such officials to deprive them of the security thus acquired, but it would, in my judgment, be a violation of duty and a usurpation of power for the comptroller to make any other or different application of the money.

The power to make and the mode of making appropriations for the expenses of the city and county government is determined by law. The mayor, comptroller, &c., are directed to make and agree upon an estimate of the various sums of money which will be required to defray all such expenses of the various boards, commissions and departments; and thereupon to fix and determine the amount thereof, "which amount, when so established, shall thereby become *appropriated* as the amount required, and shall be certified to the board of supervisors," which board is directed to raise the same by tax (*Laws* 1871, p. 1246, § 101). A subsequent chapter (583) directs such board of estimate and apportionment to *apportion* and "*set apart*" to the various departments the sums, &c.

It is understood that the board, to guide and enlighten its judgment, and as a basis of appropriation, direct estimates to be furnished, by each head of department, of the probable expenses of his department for the current ensuing year. Such estimates were furnished by the tax commissioners for the years 1872 and 1873, and, as we have seen, the items of expenses were separately stated. Those estimates furnished the board with the amount and purpose of the expenditure, and following as to purpose, if not as to amount, apportioned an aggregate sum each of those years, but in such a form as necessarily to require a specific application to each separate item.

The aggregation of the apportionment to "deputies, clerks,"

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&c., would not require, or probably allow, of a discrimination in favor or against any particular class. All and each are embraced in the designation, and none have a privy or preference over others.

But the apportionment to the four commissioners nearly aggregate their salaries, and leave it a separate and specific appropriation to and for them, and from whom the comptroller has no authority to divert it by paying out of it any other expense of the same department. The right to such appropriation, by reason of the form in which it has been made, has given to the commissioners a *quasi* vested claim to it, of which they cannot be legally deprived; and it would be no answer to a mandatory writ, on behalf of these commissioners, for the comptroller to aver that other expenses of the department had exhausted the appropriation.

Nor is the question affected by the fact that one of the commissioners has not demanded his salary; and another having deceased, a portion of the sum set apart for salaries cannot be demanded. These circumstances do not unfix the appropriation and set it adrift in the city treasury. It remains intact subject, perhaps, to the power of ultimate disposition; and that power is probably in the comptroller, he being authorized (*Laws 1872, chap. 9*) to transfer appropriations.

In *Green agt. The Mayor, &c., of New York* (5 Abb., 503), the court say: "The defendants, when they receive money from taxes or any other source of revenue, which they are bound to apply to any special purpose, may, by action, be compelled to pay such money to the purposes contemplated, *upon the principle that they hold the money so received by them to be so applied.*"

It does not appear that the relator's salary was included in either the estimate or the appropriation for the years 1872, 1873. It is not mentioned in terms, nor is it admitted to be included among "*deputies or clerks.*" It may, therefore, safely be said that it is not provided for in the appropriations of those years; and if I am correct in the position, that the

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amounts apportioned to the department must be applied to the purposes specified, the relator can have no remedy by mandamus.

He is entitled, however, to have his claim audited, and a mandamus lies to the auditor to adjust the demand ; and so much of the motion is granted.

The motion, as against the comptroller, must be denied, with costs.

Nat. Bank of Commerce agt. Nat. Mechanics' Banking Association.

N. Y. SUPERIOR COURT.

THE NATIONAL BANK OF COMMERCE, respondent, agt. THE
NATIONAL MECHANICS' BANKING ASSOCIATION, appellant.

Forgery in bank check, mutual mistake, upon whom loss should fall—viewed in a moral light, each party was guiltless; in the law the negligence of the one is no greater than that of the other, and for this reason it is inequitable for the defendant to detain the money paid by the plaintiffs under a mistake common to each.

General Term, December 15, 1873.

MONELL, SEDGWICK and VAN VORST, JJ.

APPEAL by defendants from a judgment entered upon the verdict of a jury under the direction of the judge before whom the case was tried, and from an order denying a new trial.

The action was brought to recover the sum of \$14,949.25, claimed to have been paid by plaintiffs to defendant under a mistake of facts.

The case shows that Vermilye and Co. were dealers with plaintiffs, depositing money with them and drawing checks against the same. On the 15th day of February, 1870, they drew a check, No. 101, on plaintiffs, for \$56.75. The check was made payable to the order of A. J. Greenleaf, to whom or to whose use it was delivered by Vermilye & Co. on the day on which it was drawn. The check was taken on the same day to the plaintiffs, by a person purporting to be Greenleaf, the payee, and presented to be certified to Thomas B. Adriance, who was the receiving teller, but who, on that day, acted as paying teller, in the temporary absence of the paying teller. Adriance certified the check. The plaintiffs kept

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a record of certified checks, and a book for the purpose, and in this book Adriance entered the check for \$56.75 in question, as certified on that day. Greenleaf, the payee of the check, was a dealer with the defendant. He had been introduced to the cashier as a banker and broker, by a customer of the bank, and left with the defendants his card, with the number of his office thereon as 70 Broadway. He opened an account with the bank on the 1st of February, 1870, and from that time down to the 16th day of February, 1870, he had made divers deposits, amounting, in the aggregate, to over \$56,000, and upon which he had, from time to time, drawn checks, so that on the sixteenth of February, when his account was balanced, there was standing to his credit only \$1.49. On the day last named, and after his account had been balanced, Greenleaf deposited with the defendants the check of Vermilye & Co., which had been certified on the fifteenth of February by Adriance, but which, after its certification had been fraudulently changed in its date from the fifteenth to the sixteenth of February, and altered in its amount from \$56.75 to \$15,006. The check was received by the defendants as genuine, and credited to Greenleaf's account at the sum of \$15,006. Greenleaf afterwards, on the same day, further deposited with the defendants the sum of \$5,600 (his last deposit), and on the same day drew out of the bank, by his checks, the sum of \$17,981.25, leaving an apparent balance in his favor on that day of \$2,626.24. The defendants having no knowledge of the forgery in the body of the check, deposited the same in the clearing-house on the morning of the seventeenth day of February, when the same was paid to the defendants by the plaintiffs as a check for \$15,006, through the exchanges in the clearing-house, in the ordinary way in which the accounts of banks are there adjusted, and the same actually came to the plaintiff's banking-house on the morning of the seventeenth of February, with other vouchers.

The check came from the clearing-house to William W. Sherman, who was the regular paying teller of plaintiff's

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bank, who was absent from the bank on the fifteenth, the day the check was certified. It was brought to Sherman by the check clerk as not being entered as a certified check on the certificate book. Sherman looked at the book and saw no entry of the check. He made no inquiries of Vermilye & Co. nor of anybody in the bank, but, knowing the signature of Adriance, and supposing the check to be genuine and regularly certified, and its entry on the sixteenth accidentally omitted, he entered the same upon the book as a check certified, of the sixteenth of February, for \$15,006, and the same was charged to the account of Vermilye & Co.

In this condition the affair remained until the twenty-fourth of February, when the account of Vermilye & Co. with the plaintiffs was written up, and the vouchers, including the check of \$15,006, were returned to Vermilye & Co. On the first of March Vermilye & Co., having in the mean time examined the vouchers, called upon the plaintiffs, produced the check, and notified the bank that the check had been altered, after drawn by them, from \$56.75 to \$15,006, whereupon the plaintiffs addressed to the defendants a letter in these words:

"NATIONAL BANK OF COMMERCE, }
"NEW YORK, *March 1, 1870.* }

"M. CHANDLER, Esq.,

"Cashier National Mechanics' Banking Association :

"DEAR SIR.—I inclose herewith check of Vermilye & Co. upon this bank, No. 101, to order of A. J. Greenleaf, purporting to be for fifteen thousand and six dollars (\$15,006), received for that amount through the Clearing-house Exchange from your bank, as per your slip, also inclosed herewith, which check we have this day learned has been altered from \$56.75, the amount for which it was drawn, and certified by us, and I therefore hereby claim and request repayment to us of the difference of \$14,949.25.

Yours, very respectfully,

"H. F. VAIL,

"Cashier."

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This was the first actual notice the defendants had of the forgery. The defendants' cashier immediately sent a clerk to 70 Broadway to make inquiries for Greenleaf, but he was not to be found there. The office was closed and no person on hand. The balance in the hands of the defendants, \$2,626.24, has since the seventeenth day of February been attached.

At the close of the testimony the defendants' counsel requested the court to submit to the jury the question whether the defendants had been injured by the laches or negligence of the plaintiffs in notifying the defendants of the alleged mistake. The court refused and the defendants excepted.

The court directed a verdict for plaintiffs for the sum of \$14,949.25, with interest, being the difference between the amount for which the check was originally drawn and certified and the altered amount; defendant excepted to such direction. Defendant moved for a new trial, which was denied.

JAMES EMOTT, *for appellants.*

BENJAMIN D. SILLIMAN, *for respondents.*

By the Court, VAN VORST, J.—When the check, in the altered condition in which it had been taken by the defendants as genuine, came back to the counter of the plaintiffs' bank on the seventeenth day of February, it was there also received as genuine, and its payment through the exchanges at the clearing-house was adopted and ratified, and, as a valid check, it was charged to the account of Vermilye & Co., the drawers of the same.

The alteration being in the body of the instrument, and not in the signature of their customer, which they were presumed to know, they are not by the act of recognition and payment of it as valid, under an honest belief that it was so, disentitled from establishing that the instrument was a forgery, or from recovering back the money paid (*Bank of Commerce agt. Union Bank, 3 Coms., 230*).

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The plaintiffs on the seventeenth day of February were deceived by the fraudulent alteration of the check, as the defendants themselves have been on the sixteenth, and the recognition by each bank of the check as valid was made under a clear mistake of facts.

No effect can be given to the certification of the check on the fifteenth of February by Adriance, the clerk of the plaintiffs, other than that the signature was genuine, and that the check was good for \$56.75, the amount for which it was drawn (*Farmers' and Mechanics' Bank agt. Butchers' and Drovers' Bank*, 16 N. Y., 125). And the money paid by plaintiffs over and above that sum they are entitled to recover back from the defendants, unless there be such facts and circumstances peculiar to this case as would justify the defendants according to equity and conscience to detain it from the plaintiffs. The defendants claim that the plaintiffs have been guilty of laches, which has resulted in loss to them, and that this negligence of plaintiffs should defeat a recovery. It was urged on the argument by defendants' counsel that it was negligence in the plaintiffs not to have entered the check, when certified, by its number, in addition to its date and amount, that the entry of the number would have aided in detecting the forgery; and further, that when the check came back to them on the seventeenth of February they did not make sufficient inquiry in regard to its genuineness before accepting it as a true instrument. The defendants urged substantially that the plaintiffs could and should have detected the forgery on the seventeenth of February, and should have immediately given notice thereof.

The evidence on the trial was to the effect that it was not customary to enter certified checks on the books by their number, but that memoranda of the dates and amounts were sufficient for the purposes for which the book was kept.

The question as to whether or not the omission of plaintiffs in this respect was negligence was not submitted to the jury, nor was any request made that it should be; and it cannot be

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said, as matter of law, that the plaintiffs were bound to make such entry, and that a failure to do so is negligence. But that the plaintiffs did not make all the inquiry and examination on the return of the check which the defendants now demand, affords no good reason why the plaintiffs should not recover in this action.

It was, without doubt, formerly the rule that if a party pays money under a mistake of fact, and no laches is imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he might recover back the money (*Milner agt. Duncan*, 6 B. & C., 671). But the limitation of the rule with respect to laches in such cases has been modified (*Kelly agt. Solari*, 9 M. & W., 54). In this case Solari had an insurance on his life in the plaintiff's company. He had made default in the payment of a premium due on the third of September, by which the policy lapsed. The actuary advised two of the directors of the default; one of them—Clift—wrote on the policy the word "lapsed." After the death of Solari, which happened in October next after the default, his wife, who had entered upon the administration of his estate, made a demand on the company for the amount of the policy. Three of the directors, including the two who had known of the default and the lapsing of the policy in September previous, and the one who had made the entry of the word "lapsed," paid the amount. After discovering the mistake an action was brought against the executrix to recover the money. The two directors on the trial testified that at the time of the payment they had entirely forgotten that the policy had lapsed. The plaintiff was nonsuited on the trial, the chief baron deciding that if the directors had had knowledge or the means of knowledge of the policy having lapsed, the plaintiff could not recover, and their afterward forgetting it could make no difference. But a new trial was ordered, baron PARKE saying "that if money be paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, how-

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ever careless the party may have been in omitting to use diligence to inquire into the fact." In that case the counsel for the defendant, in opposing the motion for a new trial, urged that the defendant was an executrix, that the money paid had become assets of the estate, and that if plaintiff succeeded the loss would fall upon her.

In *Townsend* agt. *Crowdy* (8 C. B. N. S., 477) it was held that the mere fact that the person who paid the money had, at the time of payment, means of knowledge, of which he neglected to avail himself, will not disentitle him to recover the money back, if it was paid under a real mistake (*Lucas* agt. *Worsack*, 1 *Moody & Robinson R.*, 293; *Dailey* agt. *Lloyd*, 12 Q. B. R., 531; 2 *Smith's Leading Cases*, edition of 1873; *Mannot* agt. *Hampton*, and cases cited, marginal page 402).

There is no rule that, because a party has the means of knowledge, he has the knowledge itself, or that, as a condition to recovery, he should have actually possessed himself of the knowledge within his reach.

Nor can it be maintained that the omission by a party to do everything in the conduct of his own business, the performance of which might prevent loss to himself or others, is necessarily negligent.

But in *Kingston Bank* agt. *Eltinge* (40 N. Y., 391) it was held that "care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is: Were the parties mutually in error, and did they act upon such mutual mistake? not whether they ought to have so acted. If in consequence of such mutual mistake one party has received the property of the other, he must refund, and this without reference to negligence or vigilance."

In the *Union Bank of Troy* agt. *The Sixth National Bank* (43 N. Y. R.) it was objected by the defendants to the plaintiff's right of recovery that he had been negligent in an omission to make inquiries, and to use the means at hand for arriving at correct information of the facts before parting

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with the money; but it was held, in that case, that it is no defense that the mistake arose from a want of care on the part of the plaintiff (*see also Canal Bank agt. Bank of Albany, 1 Hill, 287*).

Before taking this check from Greenleaf, on the sixteenth of February, the defendants were as much bound to make inquiries, in regard to its genuineness, as the plaintiffs were, before accepting it, on the following day.

The defendants had means of inquiry within their reach. They used none. And, before sending it to the clearing-house, they impressed upon it the sanction of their own stamp, as an evidence of their belief in the trueness of the paper. In such condition it came to and was accepted by the plaintiffs as true.

At the close of the evidence, the defendants' counsel asked the judge before whom the trial was had to submit to the jury the question whether the defendants had been injured by the laches or negligence of the plaintiffs in notifying the defendants of the alleged mistake, and that the court refused and the defendants excepted.

The defendants' request assumed that there was negligence in respect to the notification. Negligence is neither to be assumed nor presumed. It is true that negligence is often a question of mingled law and fact. But in this case, whether the plaintiffs had omitted such duties, or had failed to exercise such care and diligence as amounted to negligence, were facts to be determined by the jury. The fact that there was negligence in the plaintiffs should have been found before the jury should have been called upon to consider its consequences to the defendants.

The forgery was not discovered by the plaintiffs until the first of March, when Vermilye & Co. returned the check; immediate notice was then given to the defendants, and a demand of payment made.

The position of the defendants, if not earlier, was fixed on the seventeenth of February, when, through the exchanges of

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the clearing-house, the checks of Greenleaf on them, to an amount exceeding \$17,000, were paid. This took from the defendants more than the amount of the forged paper.

The plaintiffs were under a duty, without doubt, to notify the defendants of the forgery as soon as it was discovered by them; and had the forgery been brought to the plaintiffs' knowledge before the defendants parted with the credit they had given Greenleaf on the faith of the forged check, and there had been a culpable omission to give notice in time to save them from loss, it might well be that the plaintiffs should not recover in this action.

The remedy of the defendants is against Greenleaf now, as it would have been on the seventeenth of February had the forgery been then discovered by the plaintiffs, and they had then refused the check. Under such circumstances, the plaintiffs would have made immediate reclamation on the defendants for the amount paid through the clearing-house, and the defendants would have proceeded against Greenleaf. This course is still open to them.

Of the deposits made by Greenleaf on the sixteenth of February, there still remains with the defendants undrawn, a balance of \$2,626.24, which has been attached. By whom or upon what ground it has been seized, and whether before or since the discovery and notice by plaintiffs of the forgery, does not appear. But in the view taken of this case, this attachment cannot be interposed by the defendants to affect, in any way, the plaintiffs' right of recovery, and it would be difficult to conceive how any creditor of Greenleaf could make a claim to this balance, which was placed to his credit on the faith of a check which proved to be a forgery. Upon the facts, this money still belongs to the defendants. Greenleaf, himself, can make no valid claim to it, and no creditor can have a better right to the money than Greenleaf himself.

The judgment should be affirmed.

So ordered.

Bullard agt. Pearsall.

SUPREME COURT.

J. H. BULLARD agt. A. H. PEARSALL.

The successful party is not entitled to a double *bill of costs* on two appeals to the general term in the same case.

Third Department, Albany General Term, January, 1874.

THE plaintiff moved for a new trial at the special term, founded upon a case and affidavits showing surprise and newly discovered evidence, which was denied. The plaintiff appealed from that order to the general term before judgment. Two days after that appeal the defendant entered judgment for costs. The plaintiff then appealed from the judgment to the general term. The two appeals were contained in the same printed case and were argued together at the general term, and one decision was made affirming the judgment and order appealed from. Upon this decision the defendant claimed \$100 costs on each appeal. The clerk of Saratoga county allowed both, and upon appeal to judge INGALLS he granted an order striking out one of the bills. The defendant appealed from that order to the general term, which court affirmed the order. This question has heretofore been controverted in the courts. From cases reported it appears that three judges of the superior court of New York have decided that in such a case the successful party is entitled to a double bill of costs, and that the same number of supreme court judges have held that he is only entitled to a single bill. This decision of the general term settles the question for this department. The appeal was argued by J. P. BUTLER *for the appellant* and E. F. BULLARD *for the respondent*.

Hemphill agt. Trull.

SUPREME COURT.

HEMPHILL agt. TRULL *et al.*

An *appeal* from an order made at special term, sustaining exceptions to a referee's report upon a question of fact reversing the referee's decision, cannot be taken directly to the general term. Judgment must first be entered and the appeal taken from that.

Third Department, Albany General Term, January, 1874.

THIS was an action to partition certain real estate in Cohoes, and to determine whether a certain judgment standing on record had been paid. That question was sent to a referee, who reported the judgment paid. The owner of the judgment filed exceptions to the report, which were argued before judge INGALLS, who sustained the exceptions and held the judgment unpaid. Without entering judgment the plaintiff appealed directly from that order to the general term.

C. F. DOYLE and J. F. CRAWFORD, *for the appellant.*

E. F. BULLARD, *for the respondent,* claimed that the appeal was premature, and that the only mode to review the decision was to allow judgment to be entered, and then appeal from the judgment. The court sustained that view, and dismissed the appeal with costs.

Parisen agt. Parisen.

SUPREME COURT.

WILLIAM B. PARISEN et al. agt. PHILIP PARISEN et al.

Where objections are made to the title of real estate in consequence of certain defects in the proceedings, and on reference they are found to be well taken, and it is impossible to cure them, the sale should be rescinded and the purchaser reimbursed.

General Term, October, 1873.

APPEAL from an order denying the plaintiff's motion for a resale in partition.

JOHN TOWNSEND, *for plaintiffs.*

JOHN ANDREWS, *for purchaser.*

FANCHER, J.—The judgment in this action was entered on the 24th of January, 1862, and ordered a sale of certain premises in the city of New York under the direction of a referee. The premises consist of four lots of land on One Hundred and Fifteenth street, 100 feet west of the Eleventh avenue, and they were sold by the referee in one parcel on the 9th of July, 1862, to William H. Husted for \$600.

Objections were made to the title by the purchaser on account of certain defects in the proceedings. A reference was had to consider and report upon the objections. They were found to be well taken, and on the 28th of November, 1862, the referee, Hon. William Mitchell, made his report to the court, in which, among other things, he said:

“The matter stood adjourned before me to supply these omissions, but they were not supplied, and, I infer, cannot be at present. Under these circumstances, and considering the time elapsed since the purchase and the probable change in

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the value of the property since that time, I am of opinion that the purchaser should be discharged from his purchase."

Some costs were incurred on this reference, and neither the plaintiffs nor the purchaser took up the report, but allowed matters to remain as they were until 1869.

On the 9th of June, 1869, before either party had made any motion upon the report, the attorney for the plaintiffs addressed a letter to the attorney for the purchaser, asking for the amount of the purchaser's payments, and offering to refund the same and have an order entered releasing him from his purchase. The letter was answered and an early reply promised, but until October, 1870, no definite response was made, except several promises by the attorney for the purchaser to the attorney for the plaintiffs "to inform him of the amount of purchaser's costs and disbursements."

Pausing at this point, it would seem that the plaintiffs had done what was proper in offering to reimburse the purchaser, and to release him from his purchase; and had the learned referee, who considered all the circumstances, possessed the power, he doubtless would have ordered the purchaser reimbursed and the sale rescinded.

The plaintiffs then noticed a motion for an order to that effect, and the purchaser, in November, 1870, prepared affidavits to oppose the motion. In them it appeared that the purchaser had assigned his bid to George G. Andrews, of Brooklyn, who had also bought certain outstanding claims or liens upon the premises. It was further set forth in the opposing affidavits that repeated requests had been made of the plaintiffs' attorney to file the summons, and to supply an affidavit of the signatures of the parties who had admitted service of the summons. But, on reference to the referee's report, it will be seen that a compliance with such requests would not suffice; for there were other material defects in the proceedings pointed out by the referee. The place of service of the summons was not, in several instances, specified, and that is a statutory requirement. There was a mortgage

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on the premises, alleged to have been paid, but it was unsatisfied of record, and the mortgagee had not, so far as the record showed, been properly served with the summons.

The motion thus noticed was not decided until the 10th of May, 1871, when the court denied the motion to rescind the sale, and ordered the summons to be filed and the defects in the service thereof to be supplied.

It does not appear by the papers before the court that it is in the power of the plaintiffs or the purchaser to supply such defects, and that, it seems to me, is an unanswerable reason why the order applied for at special term should have been granted. The learned judge, at special term, put his decision upon the ground that there was negligence on the part of the plaintiffs greater than on the part of the purchaser. But on the papers it is not a question of negligence exclusively; it is whether the plaintiffs have power to supply the defects in the proceedings. It nowhere appears they could do so, and the inference drawn by the referee was that they could not. Under such circumstances it would seem to be the dictate of justice that the purchaser should be reimbursed and the sale rescinded.

There is another reason why the motion at special term should have been granted. On the facts found as to the title no action for partition could be maintained, for the entire title is vested in the plaintiffs. The action was therefore one to remove clouds upon the title. It should have been tried at special term, and the decree or judgment removing the clouds on the title there made. The statutes relating to partition, and under which the referee could be ordered to sell, are not applicable. No sale is necessary or proper. If the apparent liens and claims of the defendant are only clouds upon the title, they should be removed by an appropriate decree, when the title would be cleared and the plaintiffs' ownership established. They could then sell and convey their own premises, without aid of the court, if they desire to do so. If any of them desire to sell and the others do not,

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there would be no case made for a partition suit with all the owners as plaintiffs; but an action should be brought with the former part owners as plaintiffs and the others as defendants.

The order at special term should be reversed, and an order granted to reimburse the purchaser and to set aside the sale, the order to be settled on two days' notice.

INGRAHAM, P. J., concurred.

Trenor agt. Jackson.

N. Y. SUPERIOR COURT.

JOHN S. TRENOR agt. JAMES S. JACKSON.

The defendant being the lessee for a term of years of premises occupied by him as a grocery store, on the corner of Sixth avenue and Forty-eighth street, New York, the lease containing a covenant by the defendant that "he will not make any alterations therein without the written consent of the party of the first part, under the penalty of forfeiture and damages;" and the plaintiff (lessor) alleged that the defendant was about constructing a wooden shed, or what he called an "awning," entirely around the two sides of said building, which, if erected, would greatly injure the value of the rest of the building for the purposes for which it was used, for flats and tenement apartments for families, praying for an injunction restraining the defendant from further proceeding with such erection, &c.

Held, that although the covenant in the lease alleged to have been broken is that the defendant will not make any alterations *in* the demised premises, the word "*in*" is to be taken as including *upon* as well, so that the covenant may read "*alterations in or upon*," and cover the erection which the defendant has annexed to the building.

The fair construction of the covenant, therefore, is that the lessee shall not make any alteration of the premises, so as in any respect to change them from the condition they were in when he made the covenant, without first obtaining the consent of his landlord. Such a covenant is reasonable and proper.

But although the acts of the defendant must be regarded as a violation of his covenant, yet they are not sufficient to authorize the exercise of the restraining power of the court.

The injury to the plaintiff's rights or interests are not irreparable, or such as cannot be probably satisfied at law. The damages for the breach are capable of being ascertained, and a recovery of such damages at law would be a satisfaction, and would cover the continuance of the injury, as well as the present damage.

But another remedy at law is provided. Under the terms of the lease the lessor has reserved the right to re-enter for covenants broken, and may maintain his action to recover possession of the demised premises

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Where the remedy or remedies at law are adequate, a court of equity will not exercise jurisdiction.

But the plaintiff has shaped his case so as to bring it within equity recognition by alleging that the structure is being erected by the defendant upon one of the public streets of the city of New York, without lawful authority, and is injurious to the private interests of the plaintiff.

The defendant, conceding that the erection in question, if erected without lawful authority, would be a public nuisance, and if found to be injurious to any private rights, would be amenable to the restraining power of the court, at the suit of such private person, rests upon the permission granted to him by the commissioner of public works, June 7, 1873, to erect just the shed or awning contemplated, which permission will undoubtedly justify the acts of the defendant, if the power is vested in the city to give such permission.

A purpresture, or even a public nuisance, cannot be predicated of the exercise of lawful authority, and this brings to consideration the question involving the power of municipal authorities of the city, to allow or permit the erection and continuance of what, without the requisite power to permit, would be a public nuisance.

It is enough for the purposes of this question that the city holds the fee *in trust*, and cannot, without the amplest authority, divest its use or allow its use to be divested from the exclusive public use.

It is very clear that a trust created by law, for a strictly public purpose, cannot be divested from such purpose and converted into a private use.

No case can be found which admits a power in the legislature to legalize the use of a public street for private purposes.

In the present case the appropriation of a part of one of the public streets of the city is for an exclusively private purpose.

It cannot, therefore, be claimed, that such use of the street is not inconsistent with the fullest use, or that it is for a public purpose. The corporation holding the streets in trust for the public, have exceeded their powers in attempting to authorize such appropriation and the erection and continuance of the structure complained of is without authority of law.

An appropriation of a part of a public ride by an individual, without grant, is a nuisance; so a continued incroachment upon a street.

The private and peculiar injury to the plaintiff is sufficiently manifest. The effect of the structure is sufficiently manifest.

Special Term, February, 1874.

MOTION to continue injunction.

The plaintiff is the lessee for a term of ten years from May, 1870, of the premises on the south-east corner of Sixth

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avenue and Forty-eight street, in this city, and known as numbers 842, 844, 846 and 848 Sixth avenue. Upon and covering the whole premises is a five-story building, the first story of which is occupied by the defendant as a grocery store, and the stories above are separated into eleven flats or suits of apartments, intended and used as family residences, and is let by the plaintiff to separate and different families, who are now occupying the same.

In March, 1871, the plaintiff let to the defendant the store part of said building for a term of nine years from May, 1871.

The lease contains a covenant by the defendant that he will not "make any alterations therein without the written consent of the party of the first part, under the penalty of forfeiture and damages."

The complaint then alleges that the defendant has commenced, is continuing and threatens to finish the construction of a large wooden shed, "which he calls an awning," entirely around said building, with the exception of the door-ways leading to the upper part thereof. That such shed is being so constructed as to form a covering from the building at the height of the store, extending to the curb-stone in the street on that portion of the premises fronting on Sixth avenue and on Forty-eighth street, thus entirely intercepting the view of the side-walks from any of the windows of the building above the shed, and also obstructing a view of the streets from many of the windows.

The erection and continuance of such shed, the plaintiff alleges, will greatly injure the value of the building for the purposes for which they are now used, and impede and hinder the renting thereof, and that already several of the tenants thereof have declared that they will remove therefrom if such erection is continued and completed.

Upon these facts a preliminary injunction was granted restraining the defendant from completing the shed, with an order to show cause why the injunction should not be made permanent during the pendency of the action.

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Upon the return of the order, the defendant, by his answer, averred that the awning which he proposes to erect is the kind of awning usually erected in front of stores such as that occupied by him. He denied that such erection was an alteration in the premises leased by him. He further denied the plaintiff's allegation of injury to the other parts of the premises, or that it would obstruct the view or impede the renting thereof.

In his affidavit the defendant averred that it is considered proper to have wooden awnings in order to protect the goods in the store from the effect of the sun in the summer; that the awning posts are not larger than an ordinary lamp post with the postage box attached, and do not obstruct the street as much as such lamp posts; *that they were erected under the direction of the city authorities*, and are not a nuisance and do not obstruct walking along the side-walks so much as the ordinary lamp posts.

The affidavit of the carpenter stated that he was erecting the awning in the usual manner of constructing wooden awnings in this city. That the only alteration made was in screwing a cleet along the front part of the building, which can at any time be unscrewed. He further stated that the awning was being erected pursuant to a permit granted by the city and under the inspection of a city inspector.

The permit is as follows:

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Awning (wood)—Permit.

DEPARTMENT OF PUBLIC WORKS,
BUREAU OF INCUMBRANCES, No. 237 Broadway. }
NEW YORK, June 7, 1873. }

Permission is hereby granted to James S. Jackson, of Nos. 846 and 848 Sixth avenue, of New York city, to erect a wooden awning in front of the premises known as Nos. 846 and 848 Sixth avenue, in said city, according to law and ordinances, viz.: Posts not to exceed nine inches in diameter. Cross rail

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not to exceed seven inches in width or height. Cross rail not to exceed four inches in thickness. Posts to be placed next to and along the inside of the curb-stone.

Rail on upper side not to be less than eight nor more than ten feet in height above the sidewalk. Cross rail to be strongly mortised through the upright posts. Said awning to remain only during the pleasure of the commissioner of public works.

GEO. M. VAN NORT,
Commissioner of Public Works.

E. B. SHAFER,
Superintendent of Incumbrances.

R. H. HUNTLEY, *for plaintiff.*
ALBERT MATHEWS, *for defendant.*

MONELL, J.—The grounds upon which the plaintiff claims to hold the injunction in this case are, *first*, that the acts of the defendant are in violation of his covenant; and, *second*, that the erection of the wooden shed is a public nuisance, or at least a purpresture, injurious to the private interests of the plaintiff.

The covenant alleged to have been broken is that the defendant will not make any alteration *in* the demised premises, and it is claimed that the erection of the shed, being outside the building, is not an alteration *in* the building. But I think that too narrow a construction of the covenant. It appears that the structure rests upon, and is secured to a cleet, fastened or screwed to the front of the building, running along its entire front and side, and forming partly the support to the shed. To sustain this cleet the screws have necessarily been inserted into the front of the building, and to that extent, taken in a literal sense, it is an alteration *in* the building. But I think "*in*" is to be taken as including *upon*, as well, so that the covenant may read "*alterations in or upon*" and cover the erection which the defendant has annexed to

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it. Such undoubtedly was the intention of the parties; otherwise *any* alteration of the exterior of the building would be no breach, and the tenant could remove the entire front of his store and work serious injury to the building under claim that it was not an alteration "*in*" the building.

The fair construction of the covenant, therefore, is that the lessee shall not make any alteration of the premises, so as in any respect to change them from the condition they were in when he made his covenant, without first obtaining the consent of his landlord. Such a covenant is reasonable and proper. It is for the protection of the owner against any misuse by his tenant, and in aid of his remedies for injury to his property.

Although I regard the acts of the defendant as violations of his covenant, yet I do not think them sufficient to authorize the exercise of the restraining power of the court.

The injury to the plaintiff's rights or interests are not irreparable or such as cannot be probably satisfied at law. The damages for the breach are, I think, capable of being ascertained, and a recovery of such damages at law would be a satisfaction, and would cover the continuance of the injury as well as the present damage.

But another remedy at law is provided. Under the terms of the lease the lessor has reserved the right to re-enter for covenants broken, and may maintain his action to recover possession of the demised premises.

Where the remedy or remedies at law are adequate, a court of equity will not exercise jurisdiction.

The plaintiff, however, has shaped his case so as to bring it within equity recognition, by alleging that the structure is being erected by the defendant, upon one of the public streets of the city of New York, without lawful authority, and is injurious to the private interests of the plaintiff.

It was conceded by the defendant's counsel that the erection of the shed or awning in question, if erected without lawful authority, would be a public nuisance; and if found to be

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injurious to any private rights, would be amenable to the restraining power of the court, at the suit of such private person.

Conceding this, the defendant rests upon the permission derived from the city authorities, which, undoubtedly, will justify his acts, if the power is vested in the city to give such permission.

A purpresture, or even a public nuisance, cannot be predicated of the exercise of lawful authority, and this brings me to the consideration of the question involving the power of municipal authorities of this city, to allow or permit the erection and continuance of what, without the requisite power to permit, would be a public nuisance.

It is claimed that the authority is derived from the charter of 1870 (*Sess. Laws 1870, chap. 137*), which provides that "the common council shall have power to make, continue, modify and repeal such ordinances, regulations and resolutions as may be necessary to carry into effect any and all the powers now vested in or by this act conferred upon the corporation * * * and to make such ordinances * * * in the matters and for the purposes following * * * *"

10. To regulate the use of the streets and side-walks for signs, sign posts, *awnings, awning posts* and horse troughs."

The Sixth avenue and Forty-eighth street, upon which these premises are situated, were taken by the city authorities under the provisions of the act of 1813, which declares that the city "shall become and be seized in fee" of all such lands so taken (*Valentine's Laws 1198*). But the seizin or title of the city is qualified, however, by the further provision "*in trust, nevertheless*. That the same be appropriated and kept open for or as part of a public street, avenue * * * forever, in like manner as the other public streets, avenues * * * in said city are and of right ought to be."

In *The People agt. Kerr* (27 *N. Y. R.*, 188) this qualified or restricted fee in the city is said to be more than was supposed to be needed by the public in the case of ordinary

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roads. But the court say (*p.* 197) that "the interest or estate thus conferred upon the city is limited and not absolute, limited by the purposes of the grant, notwithstanding the broad language of the statute." Again, "The grant is expressly upon trust for a public purpose, that the lands may be appropriated and used forever as public streets. The title conferred upon this public agent is wholly for public purposes, and not for profit or emolument of the city. * * * The city has neither the right nor the power to apply any such property to other than public uses, and those included within the objects of the grant." This trust is for the benefit of the general public, not for the adjacent proprietors alone, nor of the inhabitants or citizens of New York alone; but of the whole people. In *Drake agt. Hudson R. R. Co.* (7 *Barb.*, 508) this limitation of title is fully recognized.

The right to condemn private property to public use is one of the highest prerogatives of the sovereign power. It is conferred in all organic laws, and is inseparable from the functions of government. But its exercise is carefully controlled within the limits of a public necessity, and hence when such public necessity for its exercise is apparent everything in the nature of private interest must yield (*Salus populi suprema lex*).

While, therefore, the public necessities may incite the action of the sovereign power to condemn to its use the private property of its citizens, it can only be done for the purposes required; and when such purpose ceases, or the public necessity no longer exists, the property taken may, and in some cases does, revert to the original owner, as where land was taken under the railroad act of 1848. The railroad company acquired it only *during the continuance* of the corporation (*Laws* 1848, *p.* 228, § 20; *Mahon agt. N. Y. Cent. R. R.*, 24 *N. Y. R.*, 658). Whether in the event of the disuse of a public street in this city, which had been appropriated under the act of 1813, the land would revert to the original owner or his assigns, it is not necessary here to inquire.

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It is enough, for the purposes of this question, that the city holds the fee *in trust*, and cannot, without the amplest authority, divest its use or allow its use to be divested from the exclusive public use.

The principle which exhibits or limits the exercise of the legislative power over private property must necessarily carry us to the extent that after having exercised the right for the purpose and in the manner prescribed by the constitution of the state, it cannot afterwards appropriate property thus taken, either wholly or in part, to private uses.

Such a right is not found in the organic law, and is opposed by its letter and spirit.

The public necessity ceasing, the original right of the sovereign to repossess the lands would cease also, and the doctrine of reverter might well apply. So long as the public remain in the exclusive enjoyment of the franchise or property the title acquired through the exercise of the right of eminent domain will, of course, continue; but whenever such exclusive enjoyment is interrupted by private use, however sanctioned, the purposes of the grant are defeated.

In *Drake agt. Hudson R. R. Co.* (*supra*) the power of the corporation over the streets of the city was held to be such that it could grant permission to a railroad company to use a portion of the streets for a railroad track. But the decision rests wholly upon the ground that such use is not inconsistent with the common or public right. "It was not," the court says, "incompatible with the trusts of public streets and the simultaneous use of those streets by other carriages and vehicles, and for all the purposes to which streets are dedicated." But the court fully sustains the right of the public to the full and free use of the streets, and of individuals whose tenements front upon them. There is nothing in that case which sanctions any use of the public streets for merely private purposes. Such use is distinctly repudiated and denied.

So far as the power of the corporation over the subject is

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sustained by that decision, it must be regarded as overruled by the two latter cases of *Davis* agt. *The Mayor &c.* (14 *N. Y. R.*, 506); and *People* agt. *Kerr* (27 *id.*, 188). In the case of *Davis* it was held that the use of a public street for a railroad was incompatible with the public use; and in the *Kerr* case, although the inconsistency of use was denied, the court found no power in the corporation to make the grant, but sustained the grant by the legislature.

It is claimed that the power given by the charter to pass ordinances for the regulation of the use of the side-walks for awnings, &c., necessarily *implies* a power to allow or permit the erection and continuance of awnings by individuals for private purposes.

The difficulty with this position is that, even if it was competent for the legislature to give such power, it is not given by any express terms, and being subversive of a clear public right, it cannot and should not be implied. It is, I think, very clear, that a trust created by law for a strictly public purpose, cannot be divested from such purpose and converted into a private use. But even if it can be, at all, it must be done by express enactment, and never can be inferred from or as being incidental to other powers.

In *Davis* agt. *The Mayor, &c.* (*supra*), the corporation had, by resolution, given authority to the railroad company to construct their railroad in and upon the streets of the city.

That resolution was passed under the charter of 1849, which did not contain the words found in the charter of 1870. But judge DENIO, after overruling *Drake* agt. *Hudson R. R. Co.*, and holding that a railroad was distinguished from every other species of way, says (*page* 517), that for such reason "the establishment of such a road is not within the jurisdiction conferred upon the corporation over the roads and streets in that city," and that, therefore, "the resolution of the common council granting the right was without the scope of the powers of the corporation, and was wholly unauthorized and illegal."

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In the *People* agt. *Kerr* (*supra*), the court, while sustaining the power of the legislature over the subject, was compelled to adopt the principle decided in the *Drake* case, and to limit the decision in the *Davis* case to the single point of authority in the common council to make the grant, and the court there held that because the use by a railroad was not inconsistent with the public use, and further, that as a railroad was, at least to some extent, a *public* use, the *legislature* might lawfully allow its construction.

In the recent case of *Kellinger* agt. *The Forty-second Street, &c., R. R. Co.* (50 *N. Y. R.*, 206), the plaintiff sought to restrain the company from using their track in front of his premises. In reviewing the several decisions, the court makes from them all the general deduction that railroads being for a *public use* were within the uses to which the streets may be devoted; the court say: "The fee being in the public, the legislative authority can lawfully consent to modify, regulate or enlarge its uses *for the benefit of the public.*"

Whatever may be the conflict of decision as to the use by a railroad being inconsistent with the public use (and the following may be referred to as exhibiting such conflict: *Drake* agt. *Hudson R. R. Co.*, *supra*; *Davis* agt. *Mayor*, *supra*; *People* agt. *Kerr*, *supra*; *Baldwin* agt. *Mayor*, 2 *Keyes*, 387, 417; *Craig* agt. *Rochester, C. and B. R. R. Co.*, 39 *N. Y. R.*, 404), all the cases place their decisions upholding the *legislative* power upon the ground either that it is not an inconsistent use, or that it is a public necessity, and therefore a taking for public use. Without one or the other of these elements no case that I can find admits a power in the legislature to legalize the use of a public street for private purposes.

In the case before me, the appropriation of a part of one of the public streets of the city is for an exclusively private purpose.

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The defendant and not the public will derive the benefit and advantage from the structure. He says it is needed to protect the goods in his store from injury by the sun, but it does not appear that he does not intend to also use the sidewalk beneath it as a mart for the exhibition and sale of his goods, nor does it appear that some other and less objectionable kind of awning might not be used.

It cannot, therefore, be claimed that such use of the street is not inconsistent with the public use or that it is for a public purpose. The corporation, holding the streets in trust for the public, have exceeded their powers in attempting to authorize such appropriation, and the erection and continuance of the structure complained of is, in my judgment, without authority of law.

Any use of a public street is compatible with the public use, if unauthorized by law, whatever may be its degree, is a public nuisance.

An appropriation of a part of a public ride by an individual, without grant, is a nuisance (*Hoyt agt. Mayor, &c.*, 9 *Wend.*, 571). So a continued encroachment upon a street, though for the purpose of carrying on a lawful business, is unjustifiable (*People agt. Cunningham*, 1 *Den.*, 524; and see *Moshier agt. N. and S. R. R. Co.*, 8 *Barb.*, 427; *Hecker agt. N. Y. Bal. Dock Co.*, 13 *How. Pr. R.*, 549; *People agt. Vanderbilt*, 24 *id.*, 301). In *Irvin agt. Wood* (4 *Robt.*, 138) an opening in a side-walk (coal slide) for private purposes was held to be a nuisance.

Any person who sustains a private injury from the erection or continuance of a public nuisance may maintain an action.

In *The People agt. Kerr* (*supra*) the court says (*p.* 193): "Any person who suffers a private and peculiar injury from the commission of a public nuisance may maintain his own individual action for redress or prevention of the wrong." And in *Davis agt. The Mayor, &c.* (*supra*), it is said to be "well settled that when such an offense occasions or is likely to occasion a special injury to an individual, which cannot well

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be compensated in damages, equity will entertain jurisdiction of the case at his suit.

The private and peculiar injury to the plaintiff is, I think, sufficiently manifest. The effect of the structure erected by the defendant is to deprive the plaintiff, in part at least, of the beneficial enjoyment of his property. And any unlawful interruption of or interference with the full and free enjoyment of another's property, by creating or continuing a public nuisance, renders such person amenable to an action. It is not necessary that it should be hurtful to health or noxious to the senses; if it interferes with the comfortable enjoyment of life or of property, it becomes a nuisance, abatable at the suit of private persons.

It has been urged that an authority in the corporation can be found in its long and very frequent exercise of the power in different parts of the city. But judicially I cannot admit the force of this. If the corporation has not the power, the assumption of it, in any number of instances, will not create such power. It must be found to exist outside of its own practice and precedents.

It is also suggested that the process of injunction should be withheld, because neither the owner of the fee nor the actual occupants complain. It is enough, I think, that the plaintiff is sustaining injury by the defendant's unauthorized act. He has a right to complain, and I think I have shown that he is not bound to resort to an action at law for damages.

The case in this court, of *Masterson agt. Short*, having been decided one way, on the motion for an injunction (3 *Abb. N. S.*, 154), and the other way on the trial of the action (7 *Robt.*, 241, 299), it creates no embarrassment in the decision of this case.

A part of the relief sought is a compulsory judgment requiring the removal of the structure. Such relief could not be obtained at law.

My examination of the questions upon this motion has led to the conclusion that the permission, granted by the corpora-

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tion of New York to erect the shed or awning upon one of the public streets of the city, is and was not authorized by law. That being erected in such place, without sanction of law, it is a public nuisance, and, as such, being injurious to the private interests of the plaintiff, he is entitled to a continuance of the injunction.

The fear expressed by the defendant's counsel, that a decision adverse to the defendant might disturb a very large number of similar structures, even if it was well grounded, could not influence the decision in this case. But I do not think there is much ground for it. It is only by a person specially injured that an action will lie. Such cases are and must be very few.

Motion to continue injunction granted, with costs.

Wallace agt. American Linen Thread Company.

SUPREME COURT.

DAVID H. WALLACE *et al.*, respondents, agt. THE AMERICAN
LINEN THREAD COMPANY, appellant.

An order denying a motion for commission to take testimony of a foreign witness is appealable, because it affects a substantial right.

An order granting a commission is not appealable, because it cannot affect prejudicially a substantial right.

APPEAL from order of Special Term denying motion for commission.

E. F. BULLARD *for appellant.*

JOHN COCHRAN *for respondent.*

By the Court, DAVIS, J.—We are of opinion that an order denying a motion for commission to take testimony of a foreign witness is appealable. Such an order affects a substantial right. The denial of the application may prevent the party from establishing his case or defense by depriving him of the only means of getting his evidence before the court. We have held, at the present term, that an order granting a commission is not appealable, but the distinction is obvious. The granting of a commission cannot affect prejudicially a substantial right, because no party can be said to have such a right to prevent his antagonist from obtaining, in the orderly forms of law, the testimony of witnesses whom he is unable to produce personally upon a trial.

In this case the court denied the motion on the ground that the testimony sought was irrelevant. If it were clearly so, the discretion of the court would have been properly exercised. But we are of opinion that the testimony would not

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be wholly irrelevant. It might be important on the question of damages, and its admissibility for other purposes may depend upon circumstances arising in the course of the trial. The discretion of the court is a judicial one, and is liable to be reviewed.

The order should be reversed, with ten dollars costs of the appeal and disbursements therein, and the order for commission granted.

DANIELS and DONOHUE, JJ., concurred.

McMulkin agt. Bates.

SUPREME COURT.

FRANCIS McMULKIN *and* CHARLES HOVEY, executors, &c.,
agt. SILAS E. BATES.

In an action brought by plaintiffs as executors to compel defendant to complete a contract to purchase a house and lot of plaintiffs, executors of the last will and testament of Thomas Kerr, deceased, which plaintiffs agreed to convey under the will, supposing in good faith that they had such power, and on the coming in of the report of the referee the judgment of the court was that the plaintiffs had no such power under the will to convey:

Held, that the defendant cannot now be remunerated for the improvements made by him upon the premises. He should have made his examination of the plaintiffs' power and of the testator's title prior to such outlay.

Held, that the defendant should be allowed, however, against the sum of \$180, found to be the rental value of the premises, while occupied by him, the taxes for 1868, 1869 and 1870 paid by him. The sum also of \$500 on account of the purchase-money and the interest paid on the balance of the several amounts of the purchase-money.

As to the *costs* properly allowable in such case, see judge BRADY's second opinion of November 1, 1873.

New York Special Term, December, 1873.

THIS action was brought to compel defendant to complete a contract to purchase a house and lot of plaintiffs, executors of the last will and testament of Thomas Kerr, deceased, which plaintiffs agreed to convey under the will, they supposing that they had such power.

This action, so far as this relief sought is concerned, has been disposed of by the judgment of this court to the effect that the plaintiffs have no power under the will to convey.

The defendant had in his answer a counter-claim for

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damages and for money paid to the plaintiffs under the contract on account of the purchase.

The claims now to be discussed are :

1. For rent to be paid and allowed by defendant for the premises ; and, 2d. For money paid out by defendant for altering and repairing the dwelling-house on the property so as to suit the wishes of the defendant, and for taxes on the property, and for draining some water in the highway opposite the place.

I. The claims which defendant makes, and which remain for consideration and determination here, are for moneys spent on the property of persons not parties to this action and not represented by any one in this action, viz., the heirs of Thomas Kerr.

The judgment in this action denying the relief sought by the plaintiffs denies it on the ground that the trust created by the will is void, and that the plaintiffs have no title, and that no one can convey but the heirs of Thomas Kerr.

To answer this objection the defendant contends that the plaintiffs must be adjudged to pay personally, and not out of the estate in whose behalf and interest the action was brought.

1. The plaintiffs claim that they acted in good faith in making this contract and in bringing this action.

The defendant does not set up any fraud or pretend that the plaintiffs acted in bad faith. They did what they supposed to be their duty as trustees, and what they honestly supposed and were advised they had a legal right to do ; no case or precedent can be found to authorize a judgment that they personally shall pay this money.

2. If the plaintiffs were acting in their own right and not as executors, the defendant could only recover back the consideration money paid, but could not recover expenses incurred in making improvements, whether of a permanent or a temporary nature (*Peters* agt. *McKeon* 4 *Denio*, 550, approved in *Conger* agt. *Weaver*, 20 *N. Y.*, 145).

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In *Conger* agt. *Weaver* it was held that only nominal damages can be recovered in cases like this.

Such improvements are never allowed when the person making them had an equitable title, and the legal title is in another where there has been neither fraud or acquiescence on the part of the latter, after he had knowledge of his legal rights (*Putnam* agt. *Ritchie*, 9 *Paige*, 390, approved in *Gilbert* agt. *Peteller*, 38 *N. Y.*, 170).

"The defendant should have looked into the title and ascertained whether it was likely to prove satisfactory, before he took possession" and made the expenditure thereon (*Peters* agt. *McKeon* 4 *Denio*, 550).

In this case (*Peters* agt. *McKeon*), the court held that there is no reason for the allowance of payment for these improvements (*Baldwin* agt. *Munn*, 2 *Wend* 399).

The case cited by the defendant, from 24 *Barb.*, 100 (*Brinkerhoff* agt. *Phelps*), was placed upon the grounds that the vendor knew he had no title, or of a dishonest refusal to convey because a better price could be obtained from another purchaser (*Conger* agt. *Weaver*, 20 *N. Y.*, at page 146).

The other cases cited by defendant, in 9 *Peters* and in 1 *Story Circuit Reports*, are entirely dissimilar to this case.

3. The owners of this property are, as the case now stands here, the heirs of Thomas Kerr, and not represented here; neither they nor their property can be touched in this action by any judgment herein.

II. The claim for rent to be allowed to plaintiffs out of the moneys which the defendant paid on account of the contract, amounts, at thirty dollars per month, for four years, to \$1,440.

The defendant has had possession of the property during the whole time, and actually occupied it as a residence for over six months of the year 1868, and has had charge of it since he ceased to occupy it as a residence, endeavoring to sell or rent it. The property has been out of our possession all this time.

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The defendant has had the sole use and benefit of it.

The plaintiffs should be allowed the whole rent.

In *Gilbert* agt. *Peteller* (38 *N. Y.*, 171), the expenses were incurred "in exact accordance with the requirements upon which the plaintiffs insisted, and which he provided for in the contract" (*Conger* agt. *Weaver*, 20 *N. Y.*, 140).

Only nominal damages can be recovered for failure by vendor to perform where contract is made without fraud, by reason of his inability to make a good title. *Baldwin* agt. *Munn* (2 *Wend.*, 399) holds that the vendor cannot recover expenses removing to or improving the land; cited and approved in *Conger* agt. *Weaver*.

In *Putnam* agt. *Ritchie* (6 *Paige*, 390), the chancellor refused to make an allowance for improvements in good faith, where the title turned out to be void.

GEO. S. STITT, *attorney for plaintiffs.*

BRADY, *J.*—The defendant in this action, relying upon the ability of the plaintiffs to give him a legal title after the contract of sale and purchase, made improvements upon the premises which involved a large outlay. He was under no obligation by his contract to do it, and it was done, therefore, for his own benefit and advantage. The plaintiffs were not chargeable with bad faith or fraud. There is nothing shown which warrants the belief that they knew that they had no right to convey, and they did not refuse to do so. On the contrary, they were anxious to complete the contract, but the defendant refused, alleging as a reason that they could not, under the will which made them executors and trustees, convey a good title. In this he was right. His expenditures were premature, however. He should have made his examination of the plaintiffs' power and of the testator's title prior to such outlays as he made, and in that way protected himself against loss. He cannot now be remunerated for the improvements made. The laws of this state, as expounded on that

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subject, are adverse to his right thereto. Damages in such a case as this to the vendee, where the contract of sale was made in good faith and without fraud, and where there was no refusal to perform, cannot be recovered. The rules of the civil law to the contrary do not prevail in this state (*Putnam agt. Ritchie*, 6 *Paige*, 390; *Conger agt. Weaver*, 20 *N. Y. R.*, 140; *Gilbert agt. Peteller*, 38 *id.*, 165). The defendant should be allowed, however, against the sum of \$180, found to be the rental value of the premises while occupied by him, the taxes for 1868, 1869 and 1870 paid by him. The sum also of \$500 paid on account of the purchase-money and the interest paid on the balance of the purchase-money, the several amounts of which are set forth in the schedule annexed to the referee's report. The order to be entered herein on the referee's report, therefore, must conform to these views. Whatever conclusions I might adopt were the question new, I consider myself advised and therefore controlled by the authorities cited, and the cases in them considered and approved.

Ordered accordingly.

BRADY, J.—The proceeding before the referee was not a trial within the provisions of the Code (*Taaks agt. Schmidt*, 24 *How.* 340; *Randolph agt. Foster*, 4 *Abb.* 262). The trial fee allowed was, therefore, not taxable.

The allowance of sixty dollars may stand. This is not an action for an adjudication upon a will or instrument in writing. The contract of sale was not in dispute in any respect, and the question presented, upon examination of the will, which was part of the plaintiff's case, was incidentally raised and disposed of. The plaintiffs claimed that under it they had the power to sell and convey, which the defendant denied. The action being one for specific performance, it became necessary for the plaintiffs to establish their right to convey, and, for that purpose, they produced and relied upon the will. It was thus introduced as evidence and considered in that relation. If the action were one to obtain an adjudication

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cation upon a will, or was one of the actions named in section 308, the defendant could not be allowed costs, as I understand the decision in *Downing* agt. *Marshall* (37 *N. Y. Rep.*, 380). This is not one of those actions. It is for specific performance, and is a difficult case in which a defense was interposed. This brings it within section 309 (*See Segvine* agt. *Segvine* 3 *Abb.*, *N. S.* 442).

Ordered in accordance with these views.

Kelly agt. Ferguson.

N. Y. SUPERIOR COURT.

EUGENE KELLY and JOSEPH A. DONOHUE agt. GEORGE N.
FERGUSON.

A written instrument which reads as follows is, in substance, a promissory note, to wit:

"\$12,000.

"SAN FRANCISCO, *February 2, 1865.*

"On demand, at 3 o'clock P. M. of that day (no grace), for value received in legal tender notes issued by the government of the United States, I, George N. Ferguson, promise to pay Alexander Gamble, or order, \$12,000, with interest from date at the rate of two per cent per month until paid, payable monthly; both principal and interest payable in the legal tender notes issued by the government of the United States.

[U. S. Int. Rev. Stamp.]

G. N. FERGUSON."

This instrument was executed and delivered by George N. Ferguson to Alexander Gamble, as collateral security for the due performance by Ferguson of his part of an agreement, by which it had been agreed that Gamble was to loan Ferguson \$6,000 in gold, and the latter was to go to the city of New York and establish himself in the livery business in the city of New York, &c., which agreement seems to have been satisfactorily carried out.

On the 1st day of October, 1866, Gamble borrowed from plaintiff's banking-house at San Francisco the sum of \$5,000 in gold, for which he gave his own note, with that of said Ferguson, indorsed by him (said Gamble) as collateral security.

Held, that the instrument sued on was a promissory note, and that, as such, it was negotiable and transferable by indorsement. Also *held*, that the plaintiffs were not to be regarded as having any better rights on this paper than the payee, because they took it after maturity and as collateral security merely for a prior indebtedness, and, therefore, took it subject to the same defenses which defendant might have set up against Gamble, if the action had been brought by him.

But the uncontradicted testimony of the defendant showed that Gamble himself had taken the note as collateral security merely, for the repayment of a loan. This was competent, and received without objection. Any instrument, although absolute on its face, may be shown, by parol, to be a security only. The plaintiffs, therefore, could not rightfully

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recover anything beyond the extent of Gamble's interest, which amounted to the sum of \$6,000 in gold, and interest.
For this and other errors, new trial ordered.

At Special Term, February, 1873.

MOTION for a new trial on a case.

The action is brought by plaintiffs as indorsers of a written instrument, reading as follows :

“\$12,000.

“SAN FRANCISCO, *February 2, 1865.*

“On demand, at 3 o'clock P. M. of that day (no grace), for value received in legal tender notes issued by the government of the United States, I, George N. Ferguson, promise to pay Alexander Gamble, or order, \$12,000, with interest from date at the rate of two per cent per month until paid, payable monthly ; both principal and interest payable in the legal tender notes issued by the government of the United States.

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This instrument was executed and delivered by George N. Ferguson to Alexander Gamble as collateral security for the due performance by Ferguson of his part of an agreement, by which it had been agreed that Gamble was to loan Ferguson \$6,000 in gold, and that Ferguson was to go to New York and establish himself in the livery business there, and Gamble was to come on shortly afterwards, no particular time being stated, and if he wanted an interest in the business he was to have it.

Under this agreement Gamble did loan \$6,000 in gold to Ferguson, and the latter did go to New York and established himself in the livery business in that city ; but Gamble did not come on.

On the 1st day of October, 1866, Gamble borrowed from plaintiff's banking house, at San Francisco, the sum of \$5,000 in gold, for which he gave his own note, with that of said Ferguson, indorsed by him (said Gamble) as *collateral* security.

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The uncontradicted testimony of Gamble, taken by commission, also showed that Ferguson's note was made payable in legal tender notes for the reason that said Ferguson intended, at that time, to go to New York city, where legal tender notes were in general circulation; but that it was not for the reason that it was agreed that it should be paid in New York; that no such an agreement or understanding ever existed between them.

Upon the trial, defendant's counsel read in evidence the acts of congress authorizing the issue of United States notes, viz.: Act of June 30, 1864 (13 *Stat. at Large*, page 218); act of February 25, 1862 (12 *Stat. at Large*, page 345); act of July 11, 1862 (12 *Stat. at Large*, page 532); act of March 3, 1863 (12 *Stat. at Large*, page 709); and then proved the different issues of the six per cent compound interest notes, issued under the act of June 30, 1864, to the extent of \$248,000,000, and that these notes were not generally circulated as money at any time, within two or three months *after* their issue, but that they were bought and sold in the market after that time. Defendant's counsel also called attention to the fact that there were two descriptions of legal tender notes of the United States; that those issued under the act of 1864 were not declared to be money, while those issued under the other acts were expressly declared to be "lawful money of the United States."

A question also arose as to alterations of defendant's note after delivery.

Both parties having rested, defendant's counsel moved for a dismissal of the complaint on the ground that the instrument sued on was not a promissory note, and, therefore, not negotiable and not transferable by indorsement, and that the plaintiffs had not obtained any title to it that would maintain the action.

The court denied the motion and defendant's counsel excepted.

Defendant's counsel thereupon presented a number of

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requests to charge, upon which the court passed *seriatim*. But finally, the court determined to instruct the jury to find a special verdict upon the question as to whether the erasures in the note had or had not been made before its execution, and refused to submit any other question to the jury.

The cause having been summed up on this single point, the jury returned a verdict that the erasures in the note were made before it was signed, and, thereupon, after the rendition of such verdict, the court directed a general verdict for the plaintiffs for \$32,000, the full amount claimed.

The clerk then made the following entry in the minutes:

"The jury find that the erasures were made before the note was signed, and, thereupon, the judge directs a verdict for plaintiffs for \$32,000, subject to the opinion of the court at general term."

The jury were, thereupon, discharged, and on the following day a motion was made by plaintiff's counsel to correct the minutes, as entered by the clerk, by striking out therefrom the words "subject to the opinion of the court at general term."

Defendant's counsel appeared and opposed the motion, on the ground that the jury had been discharged, and that the court had no power to alter the verdict.

The court granted the motion, and defendant's counsel excepted.

THOMAS L. SNEED, *attorney for plaintiff*.

JAMES CLARK, *of counsel*.

STANLEY, BROWN & CLARK, *attorneys for defendant*.

EDWARDS PIERREPONT, *of counsel*.

FREEDMAN, J.—Defendant's request, for permission to go to the jury upon the question whether it was agreed between the defendant and Mr. Gamble that the instrument in suit should be paid in New York city, was properly denied, for the reason that the court was not bound to submit this ques-

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tion to the jury in the face of Gamble's uncontradicted and unimpeached denial of any such agreement. And the jury having found, by their special verdict, that the erasures in the note were made before its execution, the main question now before me, and relating to the merits, is as to the correctness of the direction of a verdict for the full amount claimed by plaintiffs. The learned judge who presided at the trial had previously, and I think correctly, held that the instrument sued on was a promissory note, and that as such it was negotiable and transferable by indorsement. He had also held, and I again agree with him, that the plaintiffs were not to be regarded as having any better rights on the paper than the payee, because they took it after maturity and as collateral security merely for a prior indebtedness, and, therefore, took it subject to the same defenses which defendant might have set up against Gamble, if the action had been brought by him. But he seems to have overlooked the fact that the uncontradicted testimony of the defendant showed that Gamble himself had taken the note as collateral security merely for the repayment of a loan. This evidence was not only competent, but was received without objection. Any instrument, although absolute on its face, may be shown by parol to be a security only (*Van Pelt agt. Otter*, 2 *Sweeny*, 202, and cases there cited.) This being so, plaintiffs could not rightfully recover anything beyond the extent of Gamble's interest, which amounted to the sum of \$6,000 in gold and interest; and under the decisions of the United States supreme court in *Bronson agt. Rodes* (7 *Wall.*, 229), *Butler agt. Horwitz* (7 *id.*, 258), and *Trebilcock agt. Wilson* (12 *id.*, 687), and the decision of this court in *Quinn agt. Lloyd* (1 *Sweeny*, 253), the verdict, as the case then stood, should have been directed for that amount only, payable in gold coin, with interest thereon, at the rate specified in the note, also payable in gold. A modification of the verdict to that extent might possibly, even now, be ordered as a condition for refusing a new trial, were it not that up to this time defendant's statement, that

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the note represents merely a collateral security for the repayment of a loan of \$6,000 in gold, is the *only* evidence before the court as to the said note being something different from what, upon its face, it purports to be; that such evidence was given at a time when plaintiffs were unprepared to meet it, and that it is capable of being contradicted by Gamble on another trial.

This being so, and the irregularities in the submission of the case to the jury being also of sufficient weight to call for a new trial, plaintiff's exceptions must be sustained, and a new trial ordered, with costs to defendant to abide the event.

Dusenbury agt. Lehmnier.

N. Y. SUPERIOR COURT.

ELIZABETH DUSENBURY *et al.* agt. BENJAMIN LEHMNIER
et al.

In an action to set aside a mortgage sale upon the ground of fraud in the manner of making the sale, a *demurrer* to the complaint, interposed upon the ground that the complaint contains no allegation that the plaintiffs tendered back the money realized upon the foreclosure sale, cannot be sustained.

Special Term, February, 1873.

VAN BRUNT, J.—This is an action to set aside a mortgage sale upon the ground of fraud in the manner of making the sale.

A demurrer to the complaint has been interposed, based upon the ground that the complaint contains no allegation that the plaintiffs tendered back the money realized upon the foreclosure sale.

The complaint contains an offer, upon the part of the plaintiffs, to return all the money realized upon the sale, with interest.

The defendants, in support of the demurrer, have cited numerous cases to show that, before an action can be maintained to rescind a contract, it is necessary that the plaintiffs should return, or offer to return, all that has been received under the contract.

Upon an examination being made of those cases, it will be found that they are all actions at law brought as though the contract had been rescinded, and they all say that a party cannot proceed as though the contract has been rescinded until he has returned, or offered to return, all that has been

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received under the contract, and that that tender must be kept good at the trial.

It is necessary that such a rule should be adopted in actions at law, because, otherwise, the party suing could retain all that he had received under the contract, and recover as though the contract had never existed, and the court would be powerless to compel, by its judgment, restitution.

But in an action in equity the rule is very different. The court has full power to compel all parties to do equity, and can, by its judgment or decree, protect the rights of all.

It is urged, in support of the demurrer, that the plaintiffs have not been able to show any authority to support the position which they seek to maintain. This may be because the principle has been considered so well settled that no one has ever before raised the question; and that this is the true reason why such authorities cannot be found, is evidenced by the fact that, although the defendants have cited many authorities to show that tender must be made before suit brought, they are all cases, as I have before said, of actions at law, and they have been entirely unable to find a single case in equity where any such principle has ever been hinted at, much less decided.

The demurrer must be overruled, with costs. Defendants to be at liberty to withdraw demurrer and answer in twenty days.

Talcott agt. Belding.

N. Y. SUPERIOR COURT.

TALCOTT agt. BELDING.

A defendant is not *estopped* by the execution and delivery of an *undertaking* to the sheriff from showing the true amount and value of the goods taken by the sheriff, and redelivered to him.

Nor can the plaintiff's affidavit, nor the recitals in the undertaking be used as showing the true amount and value of the goods, where the allegations in these papers are too indefinite and uncertain to justify a verdict for any precise sum or quantity of articles, &c.

Executions in these cases must clearly describe the property of which possession is to be delivered.

An undertaking given in these proceedings is not required to be sealed and is not a deed, nor does it form any part of the record in the action; it is collateral. As an *estoppel in pais* it is inoperative.

Where the defendant is lawfully in possession of goods under an assignment made to him for the benefit of creditors, a *demand*, by the plaintiff, of the property before suit brought is necessary.

APPEAL from judgment at special term.

General Term, December, 1873.

Before BARBOUR, Ch. J., MONELL and VAN VORST, JJ.

VAN VORST, J.—The defendant was not estopped by the execution and delivery of the undertaking to the sheriff from showing the true amount and value of the goods taken by the sheriff and redelivered to him. In fact, I think it was incumbent upon the plaintiff before resting his case to have given affirmative evidence of the facts, and that neither the plaintiff's affidavit nor the recitals in the undertaking were sufficient for the purpose of showing the actual value, or properly identifying the goods as to quantity.

The allegations in these papers, if admissible, were too indefinite and uncertain to justify a verdict for any precise

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sum as the value, or any correct estimate of the number of articles in the defendant's possession. So much so that it would be difficult to enforce, by execution, a judgment establishing the right of property and possession to specific personal chattels. This action is, to some extent, of the nature of a proceeding *in rem*.

The execution in cases of this character must particularly describe the property of which possession is to be delivered. "Two hundred dozen shirts and drawers, or thereabouts, forty dozen jackets, more or less," is not such a particular description as the law requires (*Code* § 289, *sub.* 4). In *De Witt* agt. *Morris* (13 *Wend.*, 497), the goods and chattels were described as about 400 tons of iron ore. The court held the writ defective in not being more specific as to quantity, and that the sheriff could have refused to execute the writ.

The learned judge, by his rulings and in his charge to the jury, held that the defendant was bound by the recitals in the undertaking, and was not at liberty to question the quantity of goods taken by the sheriff or redelivered to him.

Now, in order to properly construe the recitals in the undertaking, they must be read in connection with the plaintiff's affidavit to which it refers, and its statements in respect to the goods, of which delivery was sought, are uncertain as to quantity and inconclusive as to value.

Its want of certainty defeats the recital in the undertaking from operating as an absolute estoppel, and, it being clearly the plaintiff's statement, and not the defendants, except by a qualified and enforced adoption with its uncertainties, the defendant should not be concluded from showing the true quantity.

Besides, the rules with regard to estoppel by deed do not apply. An undertaking given in this proceeding is not required to be sealed and is not a deed, nor does it form any part of the record in the action; it is collateral. As an estoppel *in pais* it is inoperative. It is not reciprocal, for the plaintiff, notwithstanding his allegation of value, founded

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upon information and belief, could, without doubt, prove on the trial that the goods were of greater value, and, if necessary, have his complaint amended for the purpose, and, as the plaintiff's rights were secured by the seizure through the sheriff before the undertaking was given, he is not injured but rather aided. The giving of the undertaking was not designed to influence the plaintiff to omit any effort or relax his remedy; he has proceeded as far as he could in the direction of seizure, and the undertaking of the defendant, with sureties, was substituted in the place of the property actually taken. The giving of the undertaking by the defendant should not have the effect to enlarge the advantage secured by the plaintiff by his seizure of the property. The doctrine of estoppel has been guarded with strictness, because it may exclude the truth. In addition, I think the objection taken by the defendant on the trial, that no demand has been made of the defendant before suit brought is fatal to plaintiff's action. No demand was averred in the complaint or proved on the trial.

The defendant was lawfully in possession of the goods, under the assignment made to him by Brouner & Co., the vendees of the plaintiff. It is true that the assignment was for the benefit of creditors, but it was such a disposition of property as the assignors could lawfully make. Although they had defrauded the plaintiff, yet, until the sale was rescinded by the vendors, or steps taken for the purpose, the vendees could lawfully dispose of the property for a valuable consideration to a *bona fide* purchaser, or make other legal disposition of the same. There is no pretense that the defendant was at all implicated in, or has any notice of the assignor's fraud. Being lawfully in possession of the property at the time of the assignment, the defendant was justified in an honest belief that the assignor had a right to sell the same, or dispose of it by assignment for the payment of debts.

Being lawfully in possession of the property, delivered in

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pursuance of the assignment, the defendant could not be placed in a position in which it could be truly alleged of him that he "wrongfully detained" the same from the plaintiff, until a demand had been made upon him and he had refused; such demand and refusal would constitute a possession, otherwise lawful, unlawful, and render defendant liable to an action for "wrongful detention" (*Jessup agt. Miller*, 1 *Keyes*, 321).

In *Sluyter agt. Williams*, in this court (1 *Sweeny*, 215), it was held that, where goods were claimed to be "wrongfully detained," but which had lawfully come into defendant's possession, a prior demand and refusal must be proved to sustain the action.

Pierce agt. Van Dyke (6 *Hill* 613), approving *Barrett agt. Warren* (*supra*), whilst holding that replevin in the "*detinet*" as well as "*cepit*" will lie for a wrongful taking without previous demand, also substantially decides that if the defendant, an attorney-at-law, had proven on the trial that he had received the note, the subject of the action, for a lawful purpose, that is for collection, although the one from whom he received it had tortiously taken it, plaintiff could not have recovered without showing a previous demand.

In *Storms agt. Hyde* (32 *Barb.*, 181), it was stated by the court, E. DARWIN SMITH, J., as a proposition universally true, that no man can be subjected to an action in respect to personal property in his possession, received by delivery without personal wrong on his part, until he has refused to deliver it, upon a lawful demand to the true owner.

The learned judge uses the qualifying words "received by delivery." By this he, without doubt, meant that the possession was not tortiously or otherwise against the will of the former possessor obtained, but that he lawfully held the same by the consent and act of such former possessor (*White agt. Brown*, 5 *Lansing*, 78; *Barrett agt. Warren*, 3 *Hill*, 348, 350). In *Schofield agt. Whitelegge* (49 *N. Y.*, 259) it was held that where the plaintiff's case depends upon a wrongful

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detention without a wrongful taking, an averment in the complaint of a demand and refusal is necessary. If necessary to be averred in the complaint, it should be proved on the trial.

The judgment should be reversed, and a new trial ordered, costs to the appellant, to abide the event.

Vose agt. Florida Railroad Company.

SUPREME COURT.

FRANCIS VOSE agt. THE FLORIDA RAILROAD COMPANY *et al.*

Where the appellate court has sent a case back for the trial of a single remaining question, which belongs to the jury, the special term will order the cause put upon circuit calendar, notwithstanding objections that other issues are involved and unsettled.

Special Term, February, 1873.

MOTION to strike cause from calendar, upon the ground that it belongs to the circuit.

WILLIAM C. TRAPHAGEN, *for motion.*

STRONG & SHEPARD, *opposed.*

VAN BRUNT, *J.*—This motion is based upon the ground that the only question remaining to be tried in this action is the liability of the defendant, Yulee, as indorser of certain promissory notes mentioned in the complaint, and that that issue should be tried by a jury.

The plaintiff, in opposition to the motion, claims that there still remains another issue to be disposed of besides the question of Yulee's liability as indorser, viz., that of his right to be subrogated to all the rights of the Florida Railroad Company, or of Yulee, as indorser for said company, against the defendants Dickerson and associates, in all securities hypothecated by them, as indemnity for said notes or indorsements. The complaint has been dismissed as to all the defendants except Yulee, and, it seems to me, very clear that this question of subrogation cannot now be litigated in this action, because Edward N. Dickerson and associates are not now before the court, and they have the right to be heard upon that

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question, and it cannot be determined in their absence; and it is evident, from a reading of the opinion in the court of appeals, that in sending the case back as to the defendant Yulee, they had no idea that any question remained to be tried except the question of how much Yulee was liable for as indorser.

It would appear, therefore, that as the question of subrogation cannot possibly be now tried in the action, that it is a proper case for the circuit.

Schunemann agt. Paradise.

SUPREME COURT.

FRANK C. SCHUNEMANN agt. JOHN PARADISE *et al.*

A person duly arrested for fraud or trover cannot be discharged from arrest on the ground that he is an *infant*. (*The case of Brown agt. McCune*, 5 *Sand.*, 224, has never been followed in this court.)

New York Special Term, September, 1873.

INGRAHAM, P. J.—The defendant, Julius Paradise, has been arrested in this action and moves to be discharged.

There can be no doubt as to the sufficiency of the affidavits to warrant the arrest of the defendants charged with the fraud. The complaint charges a conspiracy to obtain the defendants' property by fraud, and success in obtaining it.

The discharge of this defendant is urged on the ground of infancy, and the counsel relies on the case of *Brown agt. McCune* (5 *Sandf.*, 224), which held that an infant could not be held to bail in an action for deceit in representing himself as of age. That case has not been followed in this court. In *Wallace agt. Morse* (5 *Hill*, 392), the contrary was held and it has uniformly been held since in this court that an infant was liable for fraud and for trover. In *Eckstein v. Frank* (1 *Daly*, 334), a similar view of the law was adopted in the common pleas, and DALY, P. J., says in reference to the case in 5 *Sandford*, that it has been considered and repudiated in this state and in a great number of cases in other cases, which are cited by him.

It is urged that the defendant is exposed to great hardship from being arrested, but that should have been considered before engaging in the fraud. It would be equally hard to be proceeded against criminally for the same offense.

The motion must be denied with ten dollars costs.

Browne agt. Cochran.

SUPREME COURT.

REBECCA H. BROWNE, executrix, &c., agt. FERGUS COCHRAN
et al.

Where there is no complete remedy at law, an action in equity is the proper remedy to recover possession of a *deed*—a paper title of certain property in Ireland.

Special Term, February, 1873.

VAN BRUNT, *J.*—This action is brought to recover possession of a certain paper alleged to be a deed of certain property in Ireland. The objection is made by defendants that it is a case of replevin, and a suit in a court of equity was not necessary. The answer to that objection is, that a judgment in replevin provides for the verdict of the jury to place a valuation on the property claimed, which it would not be possible to do in this case, as, in consequence of the peculiar nature of the instrument sought to be recovered, there is no basis upon which its value could be assessed, and we cannot determine whether it is worth anything or not.

Beside, in replevin the property taken can be counterbonded by the defendant, and such action upon the part of the defendant in such a case as this would entirely defeat the object of the suit.

It seems to me, therefore, that there is no complete remedy at law, and an action in equity must be brought.

A new trial must be had in this action, because error was committed in excluding the evidence of J. H. Lipsett as to what took place between himself and his mother at the time the deed was received by Lipsett.

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Mrs. Browne, the plaintiff, having been examined as to what took place at that interview, the last clause of section 399 withdraws the prohibition contained in the first part of the section.

Because of this error a new trial must be had.

O'Brien agt. Mechanics' and Traders' Fire Insurance Co.

COURT OF APPEALS.

JAMES O'BRIEN, sheriff, &c., appellant, agt. THE MECHANICS' AND TRADERS' FIRE INSURANCE COMPANY, respondent.

A general form of notice by the sheriff that he attaches "all the property, debts, &c., of the defendant in the possession or under the control" of the party served with the notice, when served with a copy of the warrant of attachment, does show the property levied on sufficiently, and is sufficient to constitute a valid levy under section 235 of the Code.

It is optional with the sheriff to limit his levy by specifications in his notice or not, as he pleases (*Clark agt. Goodrich*, 41 N. Y., 200 ; 44 *How. Pr. R.*, 228, explained, qualified and distinguished).

The four judges who concurred with HUNT, Ch. J., in the result in that case, did not concur in the opinion nor in the reasons given by the chief justice, as to the notice (*Kuhlman agt. Orser*, 5 *Duer.*, 242, and *Wilson agt. Duncan*, 11 *Abb.*, 3). As to this point of notice and the two general term decisions in this case, 44 *How. Pr. R.*, overruled.

Greenleaf agt. Mumford (19 *Abb.*, 469), and *Drake agt. Goodrich* (54 *Barb.*, 78), approved in the reasons given, without reference to the facts of those cases.

February, 1874.

THE sheriff sued to collect a loss under a policy of insurance issued to E. S. Candler, Jr., of Florida, by virtue of seven attachments against Candler, issued against him in New York, as a non-resident. The facts sufficiently appear in the opinion.

WM. W. BADGER, *for the attaching creditors.*

A. J. VANDERPOEL, *for the sheriff.*

GEO. W. PARSONS, *for the respondent.*

ALLEN, J.—The plaintiff was turned out of court and his complaint dismissed solely upon the ground that the attach-

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ment had never been levied upon the claim in contention, and that for want of such levy the plaintiff had no title to the same, and was not entitled to maintain an action for its recovery. Two other grounds were suggested by the defendant in his application to dismiss the complaint, but neither were considered or passed upon by the court, and neither can be said, even if decided adversely to the plaintiff upon the case as made upon the trial, to be conclusive upon the right of the plaintiff. The objections are capable of being obviated and overcome by other and further evidence, and that being the case the defendant cannot have the benefit of them upon this appeal. It is only when the record discloses an insuperable difficulty to a recovery by the plaintiff, that a judgment against him will be sustained, if the court below erred in the decision actually given. The only question before us is, whether the notice left with the defendant, at the time of leaving the certified copy of the attachment, was a sufficient compliance with section 235 of the Code, and a valid attachment of the claim now sued upon. We are not seriously embarrassed by authority, and the question as now presented may properly be considered as *res nova*.

The supreme court in the first district, and the superior court of the city of New York, where only so far as appears the question has arisen, have differed in their interpretation of the statute and the duty of the sheriff under it, and there is no settled or authoritative practice under this conflict of authority (*Kuhlman agt. Orser*, 5 *Duer*, 242; *Wilson agt. Duncan*, 11 *Abb.*, 3; *Greenleaf agt. Mumford*, 19 *id.*, 469; *Drake agt. Goodridge*, 54 *Barb.*, 78). In this court but two cases need be referred to, *Kelly agt. Roberts* (40 *N. Y.*, 432) and *Drake agt. Goodridge* (41 *N. Y.*, 210). In *Kelly agt. Roberts*, with a copy of the attachment, the sheriff left a notice with the defendant Roberts, that all the property, effects, rights, &c., and the debts and credits of the debtors in the attachment, then in his possession or under his control, would be liable to the warrant of attachment, and he was required to

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deliver all such property, &c., into the custody of the sheriff without delay. After an examination of Roberts under section 236 of the Code a new notice was served, adding to the first notice a particular statement of the claim intended to be levied upon, and to recover which the action was brought. Other questions divided the court and were considered at length, and the only allusion to the service of the attachment is the brief remark of judge JAMES, that he thought the service sufficiently identified the debt sought to be recovered. *Drake v. Goodridge* turned upon the question whether the particular securities which were in controversy, and the interest of the debtor therein had been levied upon by the sheriff, and judge HUNT, in his opinion, considers the sufficiency of a general notice, similar to that served by the sheriff in this instance, and comes to the conclusion that such a notice is not a compliance with the statute requiring the notice to show the property levied on.

Four judges concurred with judge HUNT in reversing the order appealed from, and two were for an affirmance.

Upon what precise views the four concurring judges arrived at the same result with judge HUNT does not appear. The reporter does not state that they concurred in the opinion. The report states that judge GROVER also read an opinion for a reversal. This is a mistake. His opinion was in *Clark agt. Same Defendants*, argued at the same time, and is reported in 44 *How., Pr. R.* 228, and the dissenting opinion of judge DANIELS in the Drake suit, concurred in by judge JAMES, is also reported in same book at page 234. The notice of the sheriff, served with the attachment, was essentially different from that before us, and after the general clause stating not that he attached, but that all the debts credits, &c., of the defendant in the attachment, would be liable to the said attachment, and that the bank to which it was addressed, and upon which it was served, was required to deliver all such property, &c., into the custody of the sheriff, &c.; it stated that the sheriff particularly attached the bank

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account and debt from the bank to E. R. Goodridge, &c., and thus clearly indicating and showing that the intent was to levy upon a particular debt and the property specified, and by necessary intendment excluding all other property, that is, limiting the general notice by the particular clause. There was no debt due from the bank, and the claim and interest of the defendant and debtor in the attachment proceedings was not described in the special clause of the notice, and it is, at least, doubtful whether it comes within the general clause. But the case could have been well decided upon the ground that the sheriff, by the particular form of his notice, limited his levy to the property specifically mentioned. The case did not necessarily decide the question before us.

A warrant of attachment under the Code directs the sheriff to attach and safely keep all the property of the defendant within his county, and this includes not only tangible property, real and personal, but things in action and evidences of debt (*Code*, §§ 231, 462, 463, 464).

A levy upon rights and shares in the stock of associations or corporations, and debts and other property incapable of manual delivery, cannot be effected by an actual seizure, as in case of movable chattels, but may be attached and held for the satisfaction of any judgment that may be recovered by the proceedings authorized by section 235 of the Code. A leaving of a copy of the warrant of attachment with either of the officers or agents of the association or corporation named, or with the debtor or individual holding such property, with notice showing the property levied on, is the statutory levy impounding the property for the satisfaction of the judgment, as effectually as a seizure of chattels capable of manual delivery. The statute authorizing attachments against absconding, concealed and non-resident debtors (2 *R. S.*, 2) accomplished the same purpose by the publication of a notice of the issuing of the warrant of attachment, and that the payment of any debts and the delivery of any property belonging to the debtor, to him or for his use, and the trans-

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fer of any property by him, was forbidden by law and were void, and declaring that every payment of any debt or the delivery of any property to the debtor after the first publication of the notice should be deemed fraudulent as against the trustees appointed in the proceeding (2 *R. S.*, 7, §§ 30 to 35). The proceeding under the Revised Statutes was for the benefit of all the creditors of the individual proceeded against, while the provisional remedy under the Code, by attachment, is for the benefit of a particular creditor, who may seize only so much of the property of the debtor as will be sufficient to satisfy the claim. Instead, therefore, of a general notice to bind and charge all the property of the debtor, a notice to the individual owing the debt, or holding the property intended to be levied upon, is authorized. The sheriff, by his action and the notice he gives, acquires no actual dominion over the property. It is as much beyond his personal control as before the levy, and there is no particular magic in the act of giving the notice that affects the status or the rights of any one, save as prescribed by statute, or changes the character or actual condition or possession of the property. The notice is but an act of caution to the individual upon whom it is served, intended and operating solely to prevent his paying the debt or delivering the property to the debtor, and impounding it to answer the judgment. It answers all the purposes which the law contemplates, if it notifies the individual that a warrant of attachment has been issued against his creditor, or the owner of property in his possession, and that the sheriff claims to levy upon the debt owing by him, or the property in his possession, and it would be strange, indeed, if mere surplusage, the use of language so general in its terms that it would include much more than the result would show was within the reach of the sheriff, would vitiate a notice clearly embracing debts and property subject to attachment, and owing by or in the possession of the individual served. A notice by the sheriff, that he attaches all property,

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debts and effects, and all rights and shares of stock, &c., in the possession or under the control of the individual served, does show the property levied on. A particular description of the property and debts supposed to be in the possession of or owing by him is not necessary for the information of the party served, and would not more satisfactorily show to him the property intended to be reached. The individual served necessarily knows better than the officer can know, the property and debts in his possession or owing by him subject to attachment.

A notice by the sheriff that he attached all the bonds and mortgages and promissory notes belonging to the attachment debtor in the possession of an individual, would be good without specifying the particular securities of the debtors, and if, perchance, there should be but one bond and mortgage and no promissory notes, the excessive claim would not vitiate. If a case could be supposed in which a party could be misled and injured by the generality of a notice of this kind, it might be different. To require a particular description of the rights, debts and choses in action which would identify and distinguish them from all others of a like kind, would be to render the remedy by attachment, in a great majority of cases, abortive as a process against property of this character. Neither the pursuing creditor nor the sheriff can ordinarily know the precise character of the dealings between the debtor proceeded against and third persons, and if no levy can be made, until by proceedings under section 236 of the Code the particulars can be ascertained, it is quite evident that this provisional remedy would, in very many cases, be of but little practical value. It is only by a proper and sufficient levy that the property can be held, and if that cannot be made until after an examination under section 236, it is quite evident that the sheriff would, in most cases, and might in all, be saved the trouble of making any levy. The party summoned for examination would have no difficulty in so disposing of the property as to put it beyond the reach of

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the creditor. The remedy was designed to be effectual, and, to make it so, any notice which shows to the party served that any particular part, or all of the property or debts in his possession belonging to the debtor in the attachment proceedings, or owing by him is attached and intended to be claimed and held by the sheriff, must be held to be sufficient.

In my judgment, the plain design of the provision under consideration, and the full accomplishment of every purpose that could have been intended by a notice, is fully answered by a notice like that before us, unless as in *Drake agt. Goodridge*, it is designed to levy only on a particular class or part of the property, and exclude the residue. The reasoning of judge CLERKE upon this particular question, without reference to the facts of that case, in *Greenleaf agt. Mumford* (19 Abb., 469), is entirely satisfactory to me, and, I think, conclusive. The danger and difficulty of undertaking to specify and describe the particular debt or chose in action, or the particular interest intended to be attached, is exemplified in *Drake agt. Goodridge*.

Section 236 does not qualify section 235, or aid us in determining what will be a sufficient showing of the property levied on by the notice required by the latter section. It does enable the sheriff, in his discretion, to apply for a certificate of the particular property of the debtor, in the possession of the party to whom the application is made, and, in case of refusal, authorizes an examination. But the refusal by no means suspends action upon the attachment, or prevents a levy until the examination is had. Neither is the sheriff compelled to proceed to an examination, but he may do so if he pleases. That proceeding is for the benefit of the creditor and the sheriff, but they are not bound to resort to it. If the application was made and a certificate refused, it would clearly indicate that the levy should be made at once, and an examination, if necessary, had afterwards. If the certificate is given, the sheriff is not bound by it, but may

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attach the property described by the certificate, and all other property liable to attachment in the possession of the party.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

ALLEN, J., reads for reversal and new trial.

All concur.

Slocum agt. Freeman.

COURT OF APPEALS.

HIRAM SLOCUM, respondent, agt. PLINY FREEMAN and
another, appellants.

Where the judgment creditor and the judgment debtor in the judgment, agreed upon a compromise of settlement of the judgment, and that the judgment was agreed to be *satisfied* on certain specific terms and conditions, and the defendant, instead of complying with the terms of the settlement, wrongfully, if not fraudulently, obtained a satisfaction-piece, prepared and executed by the plaintiff, and deposited by him with a third party to be delivered on defendant's complying with said terms and conditions of settlement, and filed and entered such satisfaction-piece, and procured a discharge of the judgment.

Held, that the plaintiff was entitled to have the satisfaction-piece canceled and the lien of the judgment restored.

T. R. WESTBROOK, *for respondent*.

No points for appellants.

DAVIES, *Ch. J.*—This action was instituted to compel a cancellation of a satisfaction of a judgment recovered by this plaintiff against these defendants. The facts found by the referee, before whom the action was tried, are these:

1. That on the 17th of March, 1852, the above-named plaintiff recovered a judgment in the supreme court of this state, against the above-named defendants, for the sum of \$2,200.19; that the judgment-roll in said action was duly filed in the clerk's office of the city and county of New York, in which office said judgment was duly docketed.

2. That the plaintiff, after the recovery of said judgment, and some time in the winter of the year 1853 agreed to com-

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promise and settle the said judgment for the sum of \$763.95, to be secured by the note of said defendant Pliny Freeman, payable in thirty months, with interest from the 10th day of February, 1853; that to carry out the said agreement, the plaintiff signed and acknowledged a satisfaction-piece of said judgment, dated March 16, 1853, which he delivered to one John W. Martin, with instructions to deliver the same to the defendants upon the receipt of the note of Pliny Freeman for the amount, and payable with interest and in the time before mentioned; that said Martin was not to deliver said satisfaction-piece upon any other terms, nor did the said Slocum agree to compromise and settle the above judgment upon any other terms than those before mentioned.

3. That the defendants have not complied with these terms, but on the contrary thereof, the said Martin delivered the said satisfaction-piece to the defendant Pliny Freeman, under the impression and belief that the note which he then received for the plaintiff conformed to the agreement, whereas the said note was not drawn payable with interest, as the agreement required.

4. That said Martin, and in due time, and as soon as he discovered the mistake, and that said note did not conform to the agreement, returned the same to the defendant, Pliny Freeman, for correction, who then retained the said note, and refused to execute a note in conformity with said agreement, or to restore and return said satisfaction-piece as he was requested to do; that said Freeman having improperly refused to execute and deliver a note in conformity with said agreement, or to return said satisfaction-piece, on or about the 26th of September, 1853, improperly procured said satisfaction-piece to be filed in the clerk's office of the city and county of New York, and the judgment to be marked canceled of record.

And said referee found, as conclusions of law:

1. That the plaintiff is entitled to a judgment.
2. That the satisfaction-piece delivered, as before mentioned,

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be vacated and set aside, and that said judgment be restored to full force, life and effect.

3. That the whole amount of said judgment is due and unpaid, except the sum of \$200, which is to be allowed as of the 30th day of April, 1853; but that such judgment shall not be a lien on any real estate or chattels real conveyed since the satisfaction of said judgment to *bona fide* purchasers or incumbrancers by said defendants, or either of them, before the commencement of this action.

Judgment was thereupon entered in conformity with said report in favor of the plaintiff, with costs, and on appeal the same was affirmed at general term, and thereupon the defendants appeal to this court.

The appellants submit no points. The defendants asked for no affirmation or relief in their answer.

Upon the facts found by the referee the judgment was clearly correct, and as there does not appear to have been an exception taken, nothing is reviewable in this court except to the conclusions of law found by the referee. If they are correct there is nothing for this court to pass upon.

It is too plain to need argument or authority to sustain the position that, upon these facts the plaintiff was entitled to judgment. The original judgment was agreed to be satisfied on certain specific terms and conditions. The defendants did not comply therewith, and, therefore, they were not entitled to have the judgment satisfied except upon payment of the amount due thereon. It is not pretended that they have ever done, or offered to do this. They did, however, wrongfully obtain a satisfaction-piece, prepared and executed by the plaintiff, and deposited by him, with a third party, to be delivered on the defendants complying with said terms and conditions. They obtained that satisfaction-piece without complying with said terms and conditions, wrongfully if not fraudulently, and used the same in procuring the cancellation of said judgment of record. The plaintiff was entitled to have said satisfaction-piece canceled and the lien of said judg-

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ment restored. This has been done by the judgment entered in this action, properly guarding the rights of *bona fide* purchasers or incumbrancers since said judgment was canceled of record.

The judgment was in all respects correct, and should be affirmed, with costs.

All concur.

Affirmed.

Depew agt. Dewey.

SUPREME COURT.

CHARLES A. DEPEW, appellant, agt. C. B. DEWEY, impleaded,
&c., respondent.

When sale has been made under judgment recovered in foreclosure proceedings, it will not be set aside if the mover has been guilty of any laches.

If the period prescribed by statute within which an action in equity to redeem a mortgage can be brought has expired, the court has no power to set such sale aside.

General Term, First Department, January, 1874.

THE appeal in this cause is taken from an order made at special term on the 7th day of July, 1873, setting aside a judgment recovered for the foreclosure of a mortgage assigned to the plaintiff, the sale made under the judgment on the 17th day of July, 1857, and the sheriff's deed given the plaintiff on such sale, on payment to the plaintiff of the amount due on the mortgage foreclosed, and another mortgage held and owned by him at the time of the foreclosure and sale, or bringing the same into court and depositing the amount with the clerk, and directing that the mortgages should be discharged and canceled of record, together with the bonds, upon such payment or deposit, and, upon receiving from the plaintiff a full release, under seal, of all claims against her for interest on the mortgages, and all sums paid out for taxes, assessments, insurances or otherwise, on the mortgaged premises and receiving from him the amount of the rents, issues and profits of the premises since the date of the report of the referee appointed to report the facts pending the motion, viz., the 6th of June, 1872, and taxes and assessments for the same period, the defendant, Cynthia B. Dewey, should release

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him from all claims to any of the rents, issues and profits of the mortgaged premises during the time of the plaintiff's possession to the date of such report, and that within five days after such payment or deposit of the amount due on such mortgages at the time of sale, the plaintiff should yield up and surrender to the defendant, Cynthia B. Dewey, peaceable and quiet possession of the mortgaged premises, and that the releases to be given should be executed and delivered within five days after the payment or deposit in court of the amount so due on the mortgages.

It appeared, in support of the motion in which this order was made, that the defendant, Cynthia B. Dewey, became the owner of the equity of redemption in the mortgaged premises, subject to such mortgages, and which she assumed to pay on the 5th day of May, 1856. That one of the mortgages was foreclosed in this action, which was commenced in the spring of 1857. The summons was not served upon her, she being, at the time, absent from the city, but her husband, who procured the property to be conveyed to her for a consideration supplied by him without her knowledge or procurement, and afterwards, with her permission and allowance, controlled and managed the property in her behalf, employed an attorney for her as well as himself, who appeared for them both in the action. She had no knowledge of the employment of the attorney on her behalf, and never conferred any direct authority upon her husband authorizing such employment. She knew nothing of the proceedings in the foreclosure action until after judgment had been recovered and the property had been sold. After that, and as she stated in her affidavit used on the hearing of the motion, "some time during the summer of the years 1857 and 1858, she asked her husband if the rent had been paid for said premises, when she was informed by him that the premises had been sold to pay interest, and that there was no relief; that she could not find her deed, and, having no knowledge of legal matters, and at said time having confidence in the statement of said

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Dewey, she made no further inquiry into the matter." She further added, "that she never knew of said foreclosure proceedings until the summer of 1870. That she never heard of them in any manner whatever until said time." This affidavit was sworn to, and notice of the motion given on the 6th day of October, 1871. The attorney for the plaintiff acted in good faith, supposing that the attorney who appeared for the owner of the equity of redemption was empowered to act as he did in her behalf. It appeared further, by the affidavit of Mrs. Dewey, that when the plaintiff became the purchaser at the foreclosure sale, under the judgment, that he took a deed of the premises, and ever since remained in possession of the same; and, on her information and belief, that when he purchased he did so for the benefit of himself and brother, and, in the year 1871, conveyed one-half of them to his widow, who was his sole legatee. The deed of the premises to Mrs. Dewey contains a recital that it was given for the consideration of \$4,000. Notice of the motion does not appear to have been given to the plaintiff's grantee of one-half the premises, and she does not appear to have been represented on its hearing. From the order made upon these facts the plaintiff appealed.

J. E. BURRILL, *for appellant.*

EDGAR S. VAN WINKLE, *for respondent.*

DANIELS, *J.*—It was objected for the defendant, on the argument of the appeal, that the order made was discretionary, and that no appeal could be taken from it by the plaintiff, and the cases of *Tallman* agt. *Hinman* (10 *How. P. R.*, 89), *Kingsland* agt. *Bartlett* (28 *Barb.*, 480), *Wakeman* agt. *Price* (3 *Com.*, 334), *Buffalo Savings Bank* agt. *Newton* (23 *N. Y.*, 160), and *Foote* agt. *Lathrop* (41 *N. Y.*, 358), are relied upon as supporting the objection. But in those cases the orders appealed from either set aside the sales made and opened the judgment, or denied the application for that relief, and for that reason were held to be discretionary and not to

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affect substantial rights. It was not claimed in either that the motion was not made within the time required in the observance of due and proper diligence, and for that reason the cases may be regarded as free from all objection in that respect. They may very well have been held not to be properly appealable without in the least degree affecting the rights of the parties in this case, for the court simply deprived the parties appealing from the orders of their right to the judgments recovered by them and the sales made under them, without affecting their right to ultimate redress or disturbing fixed legal rights to property purchased by them. The proceeding included in the order extended no further than could be done in the use of an equitable and ordinary discretion, and was maintained throughout by equitable considerations.

While in the case now before the court, the order not only set aside the judgment and sale under it, but beyond that adjudged to the moving defendant all the relief which in a proper case would be within the scope of an action in equity to redeem a mortgage, and that too after the period within which such an action could be maintained had been determined. Whether such extended relief could be properly administered upon a motion in any case it is not now necessary to decide. But, assuming that it could, it does not follow that it could be done in a case where the rights of the parties had become fixed as they were in this instance under the plain language of the statute of limitations. For as the relief awarded was the proper subject of an action to redeem, it was within section 97 of the Code of Procedure, requiring an action for relief not before provided for to be commenced within ten years after the cause of action shall have accrued. Before 1870 an exception existed in favor of married women, by which the disability of marriage extended to the time to bring such an action for the period of five years. But in that year that exception was repealed (*Laws of 1870 vol. 2, 1833, section 5*) and the repeal rendered applicable to existing cases (*Id., section 15*) which left this case under the unrestricted

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control of the section referred to, limiting the time for the commencement of the action to ten years from the time the right to do so occurred. This amendment terminated the existence of the exception without any saving clause, and as a necessary consequence the time for the commencing an action where the period provided by the preceding section had already expired. This was necessarily so because it left that as the only provision relating to and controlling the case, and that, in plain terms, required the action to be commenced within ten years from the time when the cause of action accrued.

That this provision applies to and controls the time within which an action to redeem a mortgage must now be brought is well settled by the authorities (*Spoor agt. Wells*, 3 *Barb.*, ch. 199, 203; *Hubbell agt. Sibley*, 5 *Lansing*, 51, and cases cited), and the cause of action accrues where an action can be maintained against a purchaser of the mortgaged premises, as soon as he enters into possession under the foreclosure sale (*Miner agt. Beekman*, 50 *N. Y.*, 337), particularly when, as in this case, he enters as purchaser, and no subsisting right of action remains on the debt or the security by reason of its extinguishment by the sale made under the judgment.

Under these circumstances the right of the plaintiff to the property purchased by him had become of an absolute and indefeasible nature when notice was given of the motion.

The policy as well as the express language of the law, was opposed to all disturbance of it at that time. The rights of the purchaser were of the most substantial nature, and the order divesting him of them was clearly appealable under subdivision 5 of section 349 of the Code. Such rights cannot be within the discretionary authority of a court on motion when they have been deliberately protected by a formal statute enacted for that purpose. Any other rule would allow the court, upon motion, to defeat the statute of limitations altogether and deprive parties of the freedom and repose from stale claims and demands which that legislation was designed to secure.

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The courts have, therefore, found it to be a duty, where a party has lost his rights by lapse of time under statutory provisions relating to them, to deny motions made for relief after the time for affording the redress claimed has been allowed to expire without any application being made to secure it. Any other course would result in a nullification of the statutes, for it would do by indirect means what, in substance, the legislature had provided should not be done by any means (*Marston agt. Johnston*, 13 *How. P. R.*, 93; *Fry agt. Bennett*, 16 *How. P. R.*, 385; *Humphréy agt. Chamberlain*, 1 *Kernan*, 274; *Wait agt. Van Allen*, 22 *N. Y.*, 319; *Salles agt. Butler*, 27 *N. Y.*, 638).

The proceedings in the action on which the judgment was recovered were technically regular, although the summons was not served personally upon the moving defendant, and she had given her husband no direct authority to employ an attorney. He probably supposed his authority to employ an attorney for her to be ample, inasmuch as she had derived the property to be affected by the proceedings through his act, and afterwards entrusted it to his control and management; and the attorney prosecuting the action on behalf of the plaintiff had no reason to suppose that any defect existed in the authority of the attorney who appeared for her in the action. On the other hand, it appears that the proceedings were carried on in good faith, upon the belief that no defect existed in the authority of the person appearing for her. If the motion to be relieved from the appearance had been made in time, it would have been within the discretion of the court whether to interpose by setting aside the proceedings or not (*Hamilton agt. Wright*, 37 *N. Y.*, 502; *Foote agt. Lathrop*, 41 *N. Y.*, 358; *Brower agt. Nichols*, 42 *id.*, 26). And where the difference between the amount due on the mortgage and the value of the property, as it is indicated by the consideration in the deed, is so inconsiderable, and the probability therefore so decided that by a personal service of the summons upon the defendant, the result, so far as the owner of the equity

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of redemption is concerned, would not have been changed, the court could very well deny the motion if it had been made within such a period as reasonable diligence prescribed. For that reason it should, under the well-settled rules of practice, have been brought on with all reasonable dispatch after notice was received of the change that had been made in the defendant's property, resulting from the default made in the payment of the interest due upon the mortgages she, in her deed, had assumed to pay. This was fairly due to the rights of the purchaser, who possibly could have protected himself against all serious prejudice to his rights if that course had been taken. In order to avoid unnecessary injury to the party relying upon the correctness of the proceedings under which his purchase may be made, motions of this description are required to be brought on as speedily as may be practicable after the discovery of the defect; and for that reason the Code has generally limited the period for such relief upon motions to one year after the party, by notice, has been apprised of what may have occurred, without his knowledge, to his prejudice (*Sec. 174*).

The proceeding is one of an equitable nature, and the right to maintain it, therefore, controlled by equitable considerations. Accordingly, full and complete notice cannot be required before the duty to act arises. As in other proceedings of an equitable nature, the notice, which is fairly sufficient to put a person upon inquiry, will be sufficient to create the obligation of subsequent diligence. This is a rule of general application in cases of an equitable character, and for that reason properly controlling in proceedings of the description involved in this appeal (*Story's Eq. Jur.*, 9th ed., vol. 1, §§ 400, 401; *Parsons on Confs.*, 5th ed., vol. 2, 671). Where such a notice is stated to be "some notice or knowledge of a fact," "which would imply to a reasonable man certain other facts, or would lead a person of ordinary caution into an inquiry which would certainly disclose those facts" (*Light-*

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body agt. North Am. Ins. Co., 23 Wend., 18; Williamson agt. Brower, 15 N. Y., 354).

The notice which the defendant swears she received from her husband in the summer of 1857 or 1858 was of this description; for she knew that the mortgages were upon the property, and that she had assumed their payment in the deed delivered to her. And when, in addition to that, she was told by her husband that the premises had been sold to pay interest, and that there was no relief, she must have inferred from those circumstances that it had been done by some formal proceedings. If she had desired to know any more about them, it then became her duty to make the inquiry. The reason why she did not do so is stated by her to be the fact that she had confidence in the statements of her husband. This concedes the duty which she felt was imposed by the information, while at the same time it attempts to excuse the omission. In that respect it is a failure, for her duty required her to inquire if she had any disposition to place herself in a position to question the validity of the proceedings by which her title had been divested. This was an obligation which the rights of the other party required should be promptly performed, for in no other way could his interests be adequately protected.

By the further statement contained in the defendant's affidavit, it appears that complete knowledge of the proceedings was acquired by her in the summer of 1870, and after that she delayed giving any notice of a motion to set them aside until the 6th of October, 1871, a period of over one year. Relief after such laches is entirely inconsistent with the existing rules of practice, which require diligence for the purpose of avoiding unnecessary injury to the party who may be prejudiced by setting his proceedings aside. On this account, as well as the effect required to be given to the statute prescribing the period within which such relief as was awarded shall be given, the order appealed from should be reversed.

DAVIS, P. J., and BARRETT, J., concurred.

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COURT OF APPEALS.

ISAAC WAIT agt. CHARLES S. GREEN.

When chattels are sold and delivered *conditionally*, the vendor's right to the property remains good as against the vendee, and his voluntary assignee and others, who purchase with knowledge of the condition, but not as against *bona fide purchasers* from the vendee.

BOCKES, J.—This is an appeal from a judgment ordered for the defendant at general term. The case is this: Catharine Corwins sold and delivered a horse to Thomas E. Billington, and took his note for \$100, at five months, with interest, payable at the Union Bank, Watertown. Directly under the note, and on the same piece of paper, was a memorandum signed by Billington, as follows: "Given for one bay horse. The said Mrs. Corwins holds the said horse as her property until the above note is paid." Mrs. Corwins transferred the note, with the memorandum underwritten, before due, to the plaintiff, calling his attention at the time to the memorandum, and stating that it was guaranteed, or just as good as guaranteed. Billington sold and delivered the horse to the defendant for a full consideration, and without notice to the latter of the condition attached to the sale to him. The note was not paid at maturity, whereupon the plaintiff demanded the horse from the defendant. He refused to surrender it, and this action was commenced for its recovery, with damages for its detention.

It seems to have been assumed that the transaction between the plaintiff and Mrs. Corwins on the sale of the note, gave the former all right in regard to the claim on the horse which Mrs. Corwins had. Such was evidently the clear intention

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and understanding of the parties. But it is unnecessary in this case to consider this point of objection. Let it be conceded that the sale and delivery were conditional; that the agreement was that the horse should remain the property of Mrs. Corwins until paid for, and that the plaintiff had succeeded to all her rights, and that the defendant was a *bona fide* purchaser from Billington, and the authorities are full to the effect that the defendant will be protected in his title. When chattels are thus sold and delivered conditionally, the vendor's right to the property remains good as against the vendee and his voluntary assignee, and others who purchase with knowledge of the condition, but not as against *bona fide* purchasers from the vendee (2 *Kent*, 498; 6 *John. Ch.*, 438; 1 *Ed. Ch.*, 146; 3 *Duer*, 352; 4 *Denio*, 323, 327; 6 *Duer*, 238; 25 *Barb.*, 474; 1 *Paige*, 312; 37 *Barb.*, 509; 5 *N. Y.*, 41; 31 *id.*, 507). These cases are not all direct decisions on the question under consideration. Several of them, however, are authoritative in support of the proposition above stated. I think particular reference need to be made only to *Smith agt. Lynes* (5 *N. Y.*, 41). In this case the action was against Lynes, the vendor, and Thompson & Co., who were *bona fide* purchasers of part of the goods from Lynes. This court held that if the sale and delivery to Lynes was conditional, no title passed as between the plaintiff and him, but that good title was obtained by Thompson & Co., in so far as they were *bona fide* purchasers from Lynes. PAIGE, J., in delivering the opinion of the court, says: "As to all the goods, therefore, purchased by Thompson & Co., from Lynes, and paid for by them, they are entitled to the protection of *bona fide* purchasers without notice, even if the delivery to Lynes was conditional. The nonsuit was, therefore, beyond all question correct as to the defendants, Thompson, Schoonmaker and Dean, the members of the firm of Thompson & Co." This decision fully sustains the opinion expressed by STRONG, J., in *Fleeman agt. McKean* (25 *Barb.*, 474, 483, 484), to the effect that when the original owner voluntarily places the goods in

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the hands of the purchaser, and then makes him the ostensible proprietor, a sale by the possessor to a *bona fide* dealer, without notice, would be valid and pass the title.

The judgment in this case is right, and must be affirmed, with costs.

All concurred.

Affirmed.

Burling agt. King.

SUPREME COURT.

CORNELIUS BURLING, appellant, agt. MARGARET KING,
respondent.

A bill in equity for the specific performance of a contract is an application to the sound judgment of the court.

The court will require, as ground for granting relief in the premises, that the agreement sought to be enforced shall be certain in its terms, mutual in its character, fair and just, founded on an adequate consideration, and be in its nature and circumstances unobjectionable to a court of equity.

In agreements between attorneys and clients, even though made under section 303 of the Code, the court will observe the rule of giving the most favorable construction thereof in the interest of clients.

Held, that there should be made by the courts, in defense of the honor and integrity of the legal profession, a discrimination between contracts properly stipulating a measure of compensation for professional services, and those in which attorneys secure to themselves an interest virtually as owners, in the subject-matter of litigation.

General Term, First Department, January, 1874.

DAVIS *P. J.*, DANIELS and DONOHUE, *JJ.*

MOTION for reargument.

Mr. SHAFER, *for appellant.*

Mr. COURSEN, *for respondent.*

DAVIS, *P. J.*,—It is well settled that a bill in equity for the specific performance of a contract is an application to the sound discretion of the court, which withholds or grants relief according to the circumstances of each particular case. As was well said by SUTHERLAND, *J.*, in the court below, the agreement sought to be enforced “must be certain in its terms, mutual in its character, fair and just, and founded on an adequate consideration, and be in its nature and circumstances unobjectionable to a court of equity.”

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The agreement in this case was made between attorney and client, stipulating in behalf of the attorney for a large share of the property in litigation, or to become the subject of litigation as a compensation for services rendered or to be rendered, and for expenses in the employment of additional counsel "and others" in behalf of the plaintiff. It has been held that such agreements can be lawfully made under section 303 of the Code. (*Benedict agt. Stewart*, 23 *Barb.*, 420.) But the rule is still in full force that such agreements are regarded with suspicion by the courts, and in case the meaning of the instrument is not transparently obvious the most favorable construction is to be put upon it in favor of the client. (*Hutchings agt. Van Brunt*, 38 *N. Y.*, 335; *Brother-son agt. Consalus*, 26 *How.*, 213; 39 *Barb.*, 513.)

Agreements between attorney and client of the kind sought to be specifically enforced in this case, when brought before a court of equity for its consideration, are subject to the well settled principles that enjoin it upon the court carefully to scrutinize the dealings and contracts between attorney and client, and to protect the latter against every attempt of the former to gain any undue advantage over his client. All presumptions are in favor of the client, and there must be clear proof, not only of the due execution of the instrument, but also of its integrity and entire fairness, outside the paper itself (*Brock agt. Barnes*, 40 *Barb.*, 421; *Nesbit agt. Lockman*, 34 *N. Y.*, 167, and see opinion of BACON, J., in *Hitchins agt. Van Brunt*, 38 *N. Y.*, 342; *Story Eq.*, §§ 308 to 324; *Ford agt. Harrington*, 16 *N. Y.*, 285; *Comstock agt. Comstock*, 57 *Barb.*, 453). It is, I think, to be regretted that the courts, in construing section 303 of the Code, did not discriminate between contracts properly stipulating a measure of compensation for professional services, and those in which attorneys secure to themselves an interest, virtually as owners, in the subject-matter of the litigation. The construction which permits such ownership tends to promote litigation in some of its worst forms, and to degrade the legal

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profession by involving its members, who allow themselves to make such contracts, in practices which the common law, and formerly the statutes of this state, denounced and punished as criminal, under the general designation of champerty and maintenance. It is quite easy to agree upon the compensation of an attorney without measuring it by a share, or any participation in the property recovered. Although such contracts are probably enforceable at law, I think it yet remains to be seen whether courts sitting in equity will classify them with the kind to which it applies its discretionary power to compel specific performance.

The learned justice who tried this case found as a fact that the agreement of plaintiff was, on his part, with intent "to prosecute and carry on said actions with the aid of counsel to be employed by him with a view of harassing the defendant in them into some settlement or result similar to that which actually took place." The evidence quite justified this finding, for it shows that while the present plaintiff brought the heavy artillery of able counsel into the case and another person as attorney of record, he devoted himself to the guerrilla tactics of hanging upon the flanks of the enemy to annoy him with affidavits and orders, injunctions, receivers, motions and stays, till he was glad to surrender at discretion. The counsel for Mr. King testifying on behalf of the present plaintiff says, "I was never more harassed in a litigation in my life than I was by Mr. Burling's services in that case * * * I would come to my office in the morning and find a bundle of affidavits and notices of motion. I would do my best to reply to them, but before I did it I would find another bundle of affidavits. He was always making motions to dismiss everything I did. I took an appeal from an order, and then I had a bundle of affidavits to dismiss that. I don't know how many affidavits, but, seemingly from Germans, from a great number of persons an infinite number of affidavits on every conceivable branch of the case." And again, after describing the injunctions and receivership, he says, "I

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never was more harassed with the efforts of an attorney
* * * I was exceedingly glad to settle."

The plaintiff himself describes the character of some portion of his work, showing that it was not limited to the bar of the court. "There has been," he says, on his direct examination, "a great deal of money spent in that suit
* * * I would rather not go into particulars about the matter; there were matters that money had to be paid for." And, on cross-examination, when pressed to account for the alleged disbursement of the money paid him by Mrs. King, "You are now getting beyond my recollection; I kept no account of that matter at all; I was continually going to lager bier saloons and to all sorts of places where money had to be spent." And when closer pressed he says: "I object to giving these details for the reason that a great part of this business is confidential, entirely, with all these parties." When asked by his counsel to state, generally, how much time was consumed in procuring the affidavits and papers up to the time of the injunction and motion to vacate, the plaintiff answered: I cannot say, further than that my time was almost continually occupied in obtaining the affidavits and papers in that printed book; it took almost the whole of my time during that period; there were a great many papers and affidavits drawn that were not used—affidavits taken from parties to prevent them from being afterward used against us; there was a great pile of them."

It seems to me impossible to conceive a better illustration of the injurious effect of such agreements between attorney and client than the disclosures of the plaintiff himself present, nor stronger reasons why a court of equity should refuse to enforce a contract which finds its consideration in the services he described and proved.

It is true the learned judge who pronounced the opinion at general term fell into an error of fact as to the time when Mrs. King paid to plaintiff the \$625, which he admitted he had received. He supposed it was after the making of

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the contract when in fact it was before ; and upon this error he based a strong argument in favor of affirming the judgment, but the court below fell into no such error ; and omitting all that was said on that subject by the learned judge in his opinion, reasons quite abundant for affirmance still remain.

The court below justly regarded the payment of the \$1,500 counsel fee on the settlement as a fact strongly indicating the impropriety of a specific performance. It is true, the counsel employed, with sagacious prudence, had that sum made payable by the decree directly to himself ; but he testified himself that he was not employed by Mrs. King but by the present plaintiff, and looked to him alone for his compensation. He was therefore Burling's counsel and agent, and what he did must be regarded as Burling's act ; and it appears that it was approved by him. If the contract meant anything, it meant that the plaintiff should pay all the expenses of counsel ; whatever was got from the other side for that purpose belong justly and equitable to Mrs. King, yet with that sum virtually in plaintiff's pocket (for it relieved him *pro tanto* from his liability to his counsel), he asks a court of equity still to compel the conveyance to himself of one-third of the real estate which was conveyed to Mrs. King by her husband on the settlement. The refusal of justice SUTHERLAND to do this seems to me to have been altogether right. He turned the plaintiff over to his remedy (if any) at law. The court at general term have dealt more favorably with him in allowing him to go to a jury with the question whether he has not already been adequately paid.

I think the plaintiff has no right to complain of this result ; and the order appealed from ought to be affirmed.

Mittnacht agt. Kelly.

COURT OF APPEALS.

GEORGE M. MITTNACHT agt. JOHN KELLY, Sheriff, &c.

Where a *chattel mortgage* conveys the whole stock in trade, the whole concern forming the grocery and liquor store of the mortgagor, *with the increase and decrease thereof*, and providing for the continued possession of the mortgagor, it is *void on its face*.

Although a horse, wagon and harness mortgaged, did not constitute part of the stock in trade which was the subject of "increase and decrease," yet as to the stock in trade, the mortgage being fraudulent as against creditors, that fraud affected the whole mortgage, rendering it wholly void.

PARKER, J.—The defendant was sued in the court of common pleas of the city of New York, for levying upon a horse, wagon and harness which the plaintiff claimed under a chattel mortgage, which had been executed to him by the execution debtor. The mortgage was given on the 12th of August, 1859, and the execution was issued on the 27th of September, 1859. Joseph Zorn, the mortgagor, carried on a family grocery store in Third street, in the city of New York. By the terms of the mortgage schedule, he mortgaged, in addition to the property in controversy, "the whole stock of trade in goods, wares and merchandise, the whole concern forming my grocery and liquor store, known as number 93 Third street, in the city of New York, *with the increase and decrease thereof*," &c., and until default in the payment of the money secured, the mortgagor was "to remain and continue in the quiet and peaceable possession of the goods and chattels, and the full and free enjoyment of the same." Upon the trial the court dismissed the complaint upon the ground that the mortgage was void upon its face, as against the execution

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creditor, and judgment was entered for the defendant. The general term affirmed the judgment; and the only question brought by the appeal to this court is, whether the mortgage is void upon its face.

The mortgaging the whole stock in trade, the whole concern forming the grocery and liquor store of the mortgagor, *with the increase and decrease thereof*, and the providing for the continued possession of the mortgagor, can have no other meaning than that the mortgagee should all the time retain a lien on the whole stock by way of mortgage, the mortgagor making purchases from time to time and selling off in the ordinary manner; the intent being not to create an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold, and take in what should be newly purchased. This is just such an arrangement as was held, in *Edgell agt. Hart* (5 *Seld.*, 213), to render the mortgage void. The case cannot be distinguished from that, and the law as pronounced in that case must be held applicable to this.

True, in this case, the horse, wagon and harness in question did not constitute part of the stock in trade, which was the subject of the "increase and decrease" spoken of; yet if, as to the stock in trade, the mortgage was fraudulent as against creditors, that fraud infected the whole mortgage, and it is wholly void (*Goodrich agt. Downs*, 6 *Hill*, 438; *Mackie agt. Cairns*, 5 *Cow.*, 547, 580; *Grover agt. Wakeman*, 11 *Wend.*, 187, 225).

I am of the opinion, therefore, that the judgment appealed from should be affirmed.

Affirmed.

Boody agt. Drew.

SUPREME COURT.

AZARIAH BOODY, respondent, agt. DANIEL DREW and others,
appellants.

When a joint-stock operation has been adjusted by the distribution of stock *pro rata*, according to the interest paid for by the parties, said adjustment cannot be disturbed at the instance of one of the stockholders.

Managers appointed in pursuance of a jointure of interests, to conduct the affairs of the parties joined, are liable for neglect or fraud, but the stockholders stand to each other in the relation of co-owners of the property managed, and cannot be made liable for the acts of their managers.

General Term, January, 1874.

FANCHER, J.—The case made by the complaint may be briefly stated. The allegations are substantially these:

1. That the firm of Kenyon Cox & Co. (composed of Kenyon Cox, Horace Manuel, William M. Hutchison and Daniel Drew) and Azariah Boody (who is the plaintiff), Milton Cortwright, Abraham B. Baylis, Stephen H. Alden, John M. Hutchison, Sidney Dillon and John S. Casement, entered into an agreement, in December, 1871, to be interested, in certain agreed proportions, in the purchase, sale and ultimate division, of 71,000 shares of the common stock of the Toledo, Wabash and Western Railway Company, and to share in the profit and loss, in the like proportions. Managers named were to buy and carry the stock until November 1, 1872.

2. That the title to said stock should be taken by four managers, viz.: Daniel Drew, Milton Cortwright, Abraham B. Baylis and Kenyon Cox, who should buy, sell and manage the same till November, 1872; and that the managers might increase the number of shares by buying and selling "puts."

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3. That the proportions in which said parties should be interested in said stock were as follows: Azariah Boody, 12,500 shares; Daniel Drew, 30,000 shares; Milton Cortwright, 7,500 shares; Kenyon Cox & Co., 5,000 shares; Stephen H. Alden, 5,000 shares; John M. Hutchison, 5,000 shares; Abraham B. Baylis, 2,000 shares; Sidney Dillon, 2,000 shares; John S. Casement, 2,000 shares.

4. That each party should furnish to the managers the money and securities required to buy and carry his agreed proportion of the stocks, or be subject to sale and forfeiture; and that the managers might employ brokers to buy and sell stocks, and might sell privileges to put and call the stock.

5. That the managers should not deal in said Toledo, Wabash and Western Railway stock on their individual account.

6. That the managers should keep accounts of all the transactions.

7. That the transactions should be closed November 1, 1872, and the respective parties should then take from the managers their ratable proportion of the shares on hand, paying to the managers their ratable proportion of the cost and bearing their ratable proportion of any losses that might result.

8. That on the 1st of November, 1872, the managers represented that 88,500 shares were on hand; that they had cost \$6,767,619.89; that the plaintiff's proportion of the shares was 15,600 shares, and his proportion of the cost was \$1,192,936.68; that thereupon said managers demanded that the plaintiff should take up such 15,600 shares, and should pay therefor such last-mentioned sum; and, as he is informed and believes, said managers made similar demands upon others of the subscribers to said contract, that they should take up their proportion of said shares on hand, and pay their proportion of the cost price, as above stated.

9. That the managers violated their agreement not to deal

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with the stock on their individual account, had dealt therein and "turned in their stock" to the account of the associates.

10. That the managers had improperly managed the trust, and made improper charges to the cost of carrying the stock; that they have not properly accounted; that, in adjusting with the plaintiff, they had put on him some of their individual shares as a part of the stock belonging to the associates, and that upon a proper accounting between the managers and associates, and between the associates themselves, "there will be found due to the plaintiff a large sum of money," without saying from whom—by implication from the managers.

11. That the plaintiff is entitled to an account from the managers.

The complaint prays that the managers may account accordingly:

"And that an account may be had and taken between the several subscribers to the said contract of December, 1871, of all the transactions had and conducted thereunder."

That each subscriber may be decreed to pay to the others whatever may be found due, and the plaintiff offers to pay what he may be found to owe.

And that plaintiff may have "such other or further relief as the court may seem proper."

It is apparent from the complaint that the plaintiff's right to an account is, upon the facts stated, a right against the managers alone. It depends upon the stipulation of the agreement and the transactions of the managers. It does not depend upon the plaintiff's ignorance of the state of the general partnership account. If it did, that account, by the plaintiff's own showing, cannot be reopened at so late a day, except for sufficient cause stated as against all the associates. It must have been adjusted between the managers and other associates when their several rights to the shares of stock were ascertained, and the stock distributed, on the first of November, 1872. The plaintiff alleges that the managers

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made demands upon the several associates for their contributions, and states that he took his share of the stock. That could not be, unless the shares of the other associates were ascertained. The plaintiff makes ground for the irresistible inference that the other associates took their shares of the stock as well as himself. The complaint does not state any facts sufficient to authorize the reopening of that adjustment, except as to the managers. It alleges that the plaintiff took his share of the stock, retiring his securities; and, if, as it must be inferred, the other associates, on the first of November, 1872, also took from the managers their shares of stock, they must severally have made their respective adjustments with the managers. What ground of complaint has the plaintiff against any of the associates, to reopen an adjustment of accounts thus deliberately made? The only grounds stated in the complaint are, that the managers violated their independent agreement not to deal in the stock on their individual account; that the managers had improperly managed the trust; had made improper charges to the cost of carrying the stock, and have not properly accounted. Let it be granted. It then follows that the plaintiff may have his action against the managers, and, if he substantiate his allegations, may have redress to the amount he has been damnified. But it by no means follows that the plaintiff can elect for the other associates to undo the November settlement, or call on them for a further account, or compel them to submit to the plaintiff's desire for a new adjustment.

The plaintiff must have assented to one adjustment when he took his share of stock. The other associates may prefer to keep their stock apportioned when the plaintiff took his share. Before they could be induced to come into the new position where the plaintiff seeks to place them, they might wish to consider whether they had better surrender what they received in the November settlement, and claim a new deal, or whether their interests are best subserved by standing upon the settlement. Certainly they have the right to adhere

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to the settlement if they wish to do so, and the plaintiff has no right to volunteer as their champion to break it up. He may act for himself, but not for them, unless they consent, which they have not done.

The plaintiff, as it appears from the complaint, is dissatisfied with the adjustment made between the managers and the other associates. He has set forth nothing that would induce the court to set aside the adjustment as to any of the associates except the managers. The plaintiff retains all the stock he received. He does not offer to return, or allege his ability to return, any part of it. He does not allege that any other associate is dissatisfied, nor that any of them but the managers had any participation in or suspicion of any act or omission of the managers, of which the plaintiff complains. The plaintiff should be left to make out his case against the managers if he can. But before he can have all the associates summoned to respond to his action, he must allege some cause of action against them. His complaint, as it now stands, alleges no cause of action against any of the defendants *except the managers*. He states that "although he has taken up his stock and redeemed the securities deposited by him with said managers, he has been unable to obtain from them a statement of the transactions conducted by them under and in pursuance of said contract." If the plaintiff has taken his share of the stock, he has had all the advantage of the same. He may have sold it and received the proceeds. He does not offer to return the stock nor the proceeds of it, but avails himself of the benefit of the agreement to the extent of receiving all "his share of the stock." He is not in a position to call any of the associates to account, except the managers, and the complaint is not sufficient, in my judgment, to enable him to do so, as against the other associates.

* The only portion of the complaint relied upon by the plaintiff in the particular which calls for an account from the associates, other than the managers is the following :

"And plaintiff further alleges that the managers have not

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accounted, in respect to the transactions covered by the agreement of December 22, 1871, and on information and belief, that the accounts between the several associates in respect thereto are unadjusted and unsettled, and that, if said accounts were adjusted and settled between the managers and the associates, and between the several associates as between themselves, there will be found to be due to this plaintiff a large sum of money."

But this paragraph of the complaint, in connection with all other averments therein, and the prayer thereof, make out no more than a cause of action against the managers. It is as to "the transactions covered by the agreement," in respect of which the plaintiff, on information and belief, alleges the accounts between the several associates are unadjusted and unsettled. Yet those transactions, so far as to apportion the stock, were assented to by the plaintiff. None of the associates, except the plaintiff, may complain of the adjustment of those "transactions." If they received their portion of stock, when they were entitled to it, in November, 1872, they may be satisfied. If any sum be found due the plaintiff, as claimed in the complaint, it is not averred that it will be due from any but the managers. Nor are any facts alleged from which it would result that any one is liable to the plaintiff except the managers.

I think the judgment should be reversed, with costs, and the demurrer sustained, with liberty to the plaintiff to amend on payment of costs.

Brown agt. Niess.

COURT OF COMMON PLEAS.

JAMES A. BROWN agt. MARGARETTA NIESS.

If no printed copies of a case are served by appellant on respondent, as required by Rule 50, then, if no motion be made by respondent to dismiss the appeal under Rule 50, when the cause is regularly reached in its order on the general term calendar, and the answer of the respondent is "ready," judgment of affirmance rendered at general term will be sustained.

The general term has jurisdiction of the appeal, to affirm, reverse or modify the judgment appealed from when a case has been made, settled and filed. A party cannot plead his own laches as cause for the defeat of his antagonist who has adhered to the rule of court.

January Special Term, 1874.

MOTION to set aside, for irregularity, judgment of affirmance rendered at general term.

J. F. DALY, J.—Defendant appealed to the general term of this court from a judgment entered on the report of a referee. The case on appeal was settled October 25, 1873, and filed December 19, 1873. Due notice of argument for January general term, 1874, was given by respondent, and service admitted by appellant's attorney. Note of issue was duly filed for January term, 1874. No printed copies of the case were ever served by appellant on respondent as required by Rule 50. Respondent did not make any motion to dismiss the appeal under Rule 50. When the cause was regularly reached in its order on the general term calendar respondent answered ready. Appellant stated to the court that the cases had not been printed, and asked for a postponement of the argument. This was refused and appellant not being ready to argue the appeal, judgment of affirmance was rendered by the general term.

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Appellant now moves at special term to set aside such judgment as irregular, on the ground that where the appellant has failed to serve printed copies of the case, pursuant to Rule 50, the respondent cannot wait and take an affirmance of the judgment appealed from when the cause is reached, but must move, under Rule 50, to dismiss the appeal. The practice of the superior court to that effect is cited in support of this view (36 *How. Pr. R.*, 366; 2 *Sweeny*, 700; 1 *Jones & Spencer*, 502).

The answer to this application is, that the general term of this court, with knowledge of all the foregoing facts, allowed the respondent to take an affirmance of the judgment, and did not require him to move to dismiss the appeal for want of service of the printed papers. That disposition of the question settles the practice in this court, which would seem to be that suggested in the superior court in 1862 (*Oates agt. Groupe*, 15 *Abb. Pr. R.*, 263). It was there said that the remedy to dismiss the appeal was not exclusive, but respondent might wait and take affirmance by default if appellant had not served his papers. The general term has jurisdiction of the appeal, to affirm, reverse, or modify the judgment appealed from, when a case has been made, settled and filed (3 *Kern.*, 341; *id.*, 344; 29 *Barb.*, 367; 32 *Barb.*, 664). The non-service of printed papers gives the respondent the right to make a summary motion to dismiss the appeal. If he do not choose to do so, but waits until the appeal is regularly called on for argument, it is so much to the advantage of the appellant, who is thus given additional time to print and serve copies of his case. But for giving such advantage to the appellant respondent does not and ought not to lose his term, if his case be regularly reached. This would be allowing appellant to benefit by his own laches. The practice followed by the general term must be considered as settling the question in this court.

Motion denied.

Saxton agt. Dodge.

SUPREME COURT.

No. 1.

JAMES A. SAXTON & JOHN DE WOLB agt. JOHN A. DODGE,
JOHN STEVENSON & JACOB POLHEMUS.

No. 2.

SAME agt. SAME.

No. 3.

JAMES A. SAXTON agt. SAME.

No. 4.

THE WAYNE COUNTY NATIONAL BANK OF OHIO agt. SAME.

In an action against three defendants who were copartners and for a partnership debt, who appear and answer by the same attorneys and by a joint answer, and two of the defendants have compromised and settled their proportion of the joint liability, a notice of trial served by the plaintiff in the action, in the ordinary form upon the surviving attorney, the other having died, with a notice indorsed on the same, to the effect "*that no personal claim is or will be made on the trial of the cause as against the defendants who have compromised, either for damages or costs, and that judgment will be demanded only as against the defendant who has not settled for the amount of damages and costs for which he may be liable,*" is regular as to all the defendants.

And where, on the trial of the cause under such notice, the attorneys for the defendants announce that they appear on the trial only for and in behalf of the defendants who have compromised, and not for the other defendant, a verdict against all the defendants, and the judgment entered thereon against all the defendants, is a verdict regularly rendered and a judgment regularly entered as against all the defendants. The proceedings on the part of the plaintiffs in procuring judgment in such a case are regular.

Such verdict and such judgment is not taken by default as against the defendant who has not compromised, or as against the defendants who have compromised.

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A motion on the part of the defendant who has not compromised, made more than a year after the judgment was entered, and he had notice of it, to set aside the judgment as against him for irregularity, is too late.

Where the agreement for the compromise or composition of the joint liability of the defendants in an action, pending in this state, is made in Ohio, the agreement is to be construed by the laws of New York and not by the laws of Ohio.

It is no defense to the defendant who has not compromised that the other defendants are discharged from their proportion of the joint liability; it appearing that the agreement was made and discharge given after the copartnership was dissolved.

Such a composition or compromise with two of the defendants and joint debtors does not discharge the other defendant and joint debtor. His liability continues.

Monroe Special Term, June, 1873.

THESE four actions—and one other, *James A. Saxton and John De Wolb agt. the same defendants, impleaded with one Ephraim Ball*—were brought in the county of Cayuga, New York, and commenced by service of summons on each personally, in March, 1867, on the defendants, John A. Dodge of Auburn, N. Y., John Stevenson of Canada, and Jacob Polhemus of Michigan, who composed the firm of “Dodge, Stevenson & Co.” These defendants—Dodge, Stevenson and Polhemus—appeared jointly by Rathbun & Sittser, their attorneys, in all five actions, and served their joint answer therein in May, 1867. These answers were all amended March, 1868. Demurrers were interposed by the plaintiffs to these amended answers May, 1868, which were argued August, 1868, and sustained, and orders duly entered and served. From these orders the defendants jointly appealed to the general term, by their said attorneys. The appeals were argued and decision rendered in March, 1870, in part affirming and in part reversing the orders of the special term, and orders entered and served accordingly by the plaintiffs July, 1870. Mr. Rathbun, one of the attorneys for the defendants, died in January, 1870, and service of the orders of the general term were served on Mr. Sittser, the surviving

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attorney. The general term orders allowed the defendants to amend such of their answers, as to which the demurrers were sustained, within twenty days, upon payment of costs of the demurrers to such answers, but they never amended those answers or paid costs. Notice of trial in the several actions in the usual form, for the Cayuga October circuit, commencing October 3d, 1870, was served personally by the plaintiffs upon Mr. Sittser, the surviving attorney for the defendants, on the 19th day of September, 1870, Mr. Sittser retaining the copies served, and giving admission of service. Upon the back of each notice of trial so served was indorsed a notice, as follows: "You will also take notice, that no personal claim is or will be made on the trial of this cause as against the defendants Dodge or Polhemus, either for damages or costs, and that judgment will be demanded only as against the defendant Stevenson for the amount of damages and costs for which he may be liable."

These four causes were moved for trial by the plaintiffs October 13, 1870, counsel appearing in behalf of Stevenson only, and making a motion to put the causes over the term, Mr. Sittser being present. The motion was denied and the causes proceeded to trial in their order, and a jury empaneled. Mr. Sittser and the counsel who had made the motion in behalf of Stevenson appeared and were present. At the close of the plaintiffs' case in each suit, the same counsel who had appeared for Stevenson only on the motion to postpone, stated "that he appeared simply for the purpose of objecting to the inquests, in behalf of Dodge and Polhemus," the other defendants, and put in evidence the plaintiffs' said notice of trial and the stipulation indorsed thereon. No other evidence was introduced by the defendants, and the jury, under the instruction of the court, rendered their verdict in each case for the full amount claimed.

On the 13th day of October, 1870, judgments were entered upon the verdicts in each of the four actions, as follows:

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<i>No. 1.</i>		
Damages	\$4,987 82	
Costs.....	213 61	
	<hr/>	\$5,201 43
<i>No. 2.</i>		
Damages	\$16,095 16	
Costs.....	216 67	
	<hr/>	16,311 83
<i>No. 3.</i>		
Damages	\$9,747 33	
Costs.....	213 61	
	<hr/>	9,960 94
<i>No. 4.</i>		
Damages	\$14,194 66	
Costs.....	213 61	
	<hr/>	14,408 27
Total.....		<hr/> <hr/> \$45,882 47

And notice of such judgments was served on Mr. Sittser, personally, the same day, and received and retained by him.

No substitution of attorneys for the defendants or either of them was ever made, and no notice was ever given the plaintiffs' attorneys that Mr. Sittser did not continue the attorney for the defendants and each of them.

Mr. Sittser wrote Stevenson that the causes were noticed for trial for said October circuit about the time the notices were served, and Stevenson received the letter, and retained the counsel who appeared for him and made the motion for the postponement of the trial.

No other proceedings were had in the actions until the service of the papers for this motion, March 22, 1873.

On the 18th day of February, 1870, and after the appeals were argued at general term, but before the decisions were rendered, the plaintiff Saxton, in behalf of the plaintiffs in the five suits, met the defendant Dodge, by appointment, of

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which the other defendants were both notified by Dodge, but which appointment they did not meet owing to other engagements, at Cleveland, Ohio, for the purpose of effecting a settlement of the suits, when the following agreement was made and executed, which Dodge carried out on his part, and received a release accordingly :

“Whereas the following entitled suits are depending in the supreme court in the county of Cayuga, in the state of New York, upon certain promissory notes heretofore executed by the firm of Dodge, Stevenson & Co., to Ball, Raff & Saxton, viz: *James A. Saxton agt. John A. Dodge, John Stevenson and Jacob Polhemus ; James A. Saxton and John De Wolb agt. Same Defendants ; James A. Saxton and John De Wolb agt. Same Defendants ; The Wayne County National Bank agt. Same Defendants.*

“And, whereas, there is also another suit pending in the same supreme court for patent fees, wherein the said James A. Saxton and John De Wolb are plaintiffs, and the said Dodge, Stevenson & Polhemus are the real defendants, although Ephraim Ball is also a defendant with them upon the record, and, whereas, the above named defendants, except the above named Ephraim Ball, are jointly indebted upon said promissory notes as the makers thereof, to the said several plaintiffs, and have also a common interest in the subject-matter of the said suit instituted and pending for patent fees as aforesaid, and, whereas John A. Dodge, one of the defendants in the aforesaid suits, proposes to make a compromise with said plaintiffs of his liability in said suits, and, whereas, the said John A. Dodge has this day paid to the said plaintiff, James A. Saxton, in hand, the sum of \$10,000, and has also herewith executed and delivered to the said James A. Saxton his four promissory notes of even date herewith, payable at the Cayuga County National Bank at Auburn, in the state of New York, with interest at seven per cent, as follows : One for \$1,333.33, at three months from date ; one for \$3,222.22, at six months from date ; one for

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\$3,222.22, in eighteen months from date ; all payable to the order of said James A. Saxton. Now, in consideration of the said promise, I, the said James A. Saxton, do hereby release and exonerate and discharge the said John A. Dodge from all and any liability by him incurred or to which he is subject as one of the makers of said promissory notes or either of them, so far as the same are embraced in any of the aforesaid suits to which I am a party ; and also from all liability to which he is or would otherwise be subject by reason of his connection with the subject-matters of said suit for patent fees as aforesaid. But this release is not designed and shall not be construed to impair the right of the said James A. Saxton and John De Wolb, or either of them, to proceed in said suits or either of them, against the said John Stevenson or Jacob Polhemus, or either of them, nor in any way to impair their liability as joint debtors with said Dodge in said suits.

“And the said James A. Saxton, in consideration of the premises, further agrees with the said John A. Dodge, that the said Wayne County National Bank shall and will release the said John A. Dodge from all further liability upon the promissory notes upon which its said suit is brought, and that he will indemnify and save harmless the said John A. Dodge from all further liability to said bank upon said notes ; but said release shall be without prejudice to the rights of said bank to proceed in said suits against the other makers of said notes, to wit, the said John Stevenson and Jacob Polhemus.

“It is understood that the said Stevenson and Polhemus, by severally giving, within two weeks, their notes for like amounts, and of the same terms and effect with the notes given to said Saxton by said Dodge as aforesaid, shall be severally entitled to a like release from their said liability as is hereby given to said Dodge.

“The notes upon which said suits are brought, when paid, are to be canceled by said James A. Saxton, and by him delivered to said John A. Dodge.

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“Executed and delivered in Cleveland, Ohio, February 18, 1870.

(Signed)

“JAMES A. SAXTON.”

A copy of this agreement was sent by Dodge to both Stevenson and Polhemus.

The defendant Polhemus complied with the provisions of the agreement, and received a release, the same as that given to Dodge.

The defendant Stevenson sent his notes to be delivered to Saxton as provided for by the agreement, but withdrew them before delivery, for the reason, as he stated, that he could not meet them, and he never did perform under the agreement, and the causes were noticed, and tried as hereinbefore stated.

On the same day that the judgments were entered in the four suits, Saxton executed and acknowledged, in behalf of all the plaintiffs therein, a release to Dodge entitled in the four suits, with a statement of the judgment entered in each suit, as follows:

“Whereas the judgments, of which the foregoing are abstracts, were and each of them was for a joint liability of the defendants therein named, and, whereas, the said John A. Dodge has, under and pursuant to chapter 257 of the statutes of the State of New York, made a separate composition or compromise of his individual liability upon said judgments and each of them, by the payment upon the same of the sum of \$1,100, now, therefore, this note or memorandum in writing is made by the said plaintiffs respectively, under and pursuant to said statute above mentioned, and as evidence of said composition or compromise made as aforesaid.

Dated October 13, 1870.”

A like instrument was at the same time executed and delivered to Polhemus and both were filed, October 19th, 1870.

Stevenson wrote Saxton several letters both before and after the trial, and after the decision of the general term

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upon the demurrers, seeking a more favorable compromise of his proportion of these claims embraced in these judgments. This correspondence continued down to less than a year before the motion papers were served. These letters bear date, March 23d, 1870, February 1st, 1871, September 26th, 1870, and April 2d, 1872.

In August, 1871, Saxton, as owner of these judgments, brought an action in equity against Stevenson and another to set aside the sale or transfer by Stevenson of certain real estate, for the purpose of satisfying these judgments against him. Stevenson and the other defendant appeared by attorney and answered in this action in November, 1871.

And afterwards procured an open commission for their examination in Canada as certified in their own behalf.

This commission was executed on the 6th day of February, 1872, at Napanee, Ontario, and Stevenson's testimony was taken.

It appeared from this testimony of Stevenson, and from other papers, that the firm of Dodge, Stevenson & Co. was dissolved, and ceased doing business on the 10th day of March, 1866, and on that day sold and transferred their business, property and effects to The Dodge and Stevenson Manufacturing Company.

Under this state of facts, Stevenson by his counsel on the 22d day of March, 1873, served the motion papers for this motion, claiming that the verdicts upon which the said judgments were recovered were taken by default, as to said Stevenson, and asking that the verdicts and judgments recorded thereon in each action be set aside and opened, because of such default, and that Stevenson have leave to pay costs of the said demurrers, and to make and serve an amended answer in each action, conforming to, or avoiding the objections stated in the opinion of the general term, or avoiding the grounds upon which such demurrers were sustained; and to make and serve supplemental answers setting up the facts relative to the said release and discharge in Ohio, and the

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further compromises, releases and discharge made after the entry of the judgments to Dodge and Polhemus, etc.

H. V. HOWLAND, *for motion*.

I. The defense is one that arose after the action was commenced, and had been in progress for three years.

But it is a perfect defense to all the partners.

The settlement and compromise with one partner, during the existence of the partnership is a good defense to all.

Whether we take the Ohio statute or the New York statute (*See Ohio Statute*, 4 vol. *Stat. at Large*, p. 450; 4 *Barb.*, 92; 1 *Denio*, 30).

II. This was a plain case where Dodge, as a partner, colluded with plaintiff and deceived Stevenson.

This is apparent from all the facts (10 *How.*, 301; 3 *Abb.*, 446; 22 *How.*, 477; 6 *How.*, 296; 26 *How.*, 394; 14 *How.*, 446).

ROLLIN TRACY, *opposed*.

I. These judgments were recorded more than one year (more than two years) before this motion was noticed.

This is against the express provision of the statute and of the Code.

By the 2d Revised Statute (Edmond's ed.), page 371, section 2, it is provided:

"No judgment in any court of record shall be set aside for irregularity on motion, unless such motion be made within one year after the time such judgment was recorded" (*Laws*, 1817).

And by the Code, section 174, it is provided:

(1.) "The court may likewise *in its discretion*, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this act; or by an order enlarge the time; and,

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(2.) "May also, *in its discretion*, and upon such terms as may be just, at any time *within one year* after notice thereof, relieve a party from a judgment or order, or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect." * * * * *

This motion comes directly within these statutes.

And the court has no jurisdiction to entertain the motion, as the period of *one year*, the time limited within which the court can exercise a discretionary power, has long since expired (*See Park agt. Church*, 5 *How.*, 458; *Whitney agt. Kenyon*, 7 *How.*, 458; *Van Benthuyzen agt. Lyle*, 8 *How.*, 312; *Martin agt. Lott*, 4 *Abb.*, 365; *Cook agt. Dickerson*, 1 *Duer*, 687; *The M. & M. Bk. of, &c.*, agt. *Boyd*, 3 *Denio*, 257; *Armory agt. Armory*, 3 *Abb.* [*N. S.*], 16).

These statutes and these cases must be conclusive of this motion.

II. Even if the court entertains the motion, on the merits, the papers must disclose such a state of facts as will convince the court that this is not a case where, in the exercise of its discretion, the motion should be granted.

Any fraud or deception practiced by the defendant Dodge upon his copartners and codefendant Stevenson, can have no effect upon the rights of these plaintiffs who have in nowise participated in such deception. That is a matter to be settled between Dodge and Stevenson, and these plaintiffs should not be embarrassed or delayed thereby from the collection of their claims.

III. These judgments were not taken by default in any sense, certainly not in the sense contemplated by the Code.

IV. *First.* The agreement sought to be set up by the answers, is not one to which the Ohio laws apply, but one which must be construed by the laws of New York.

Although it is an agreement made in Ohio, it is to take effect and become operative in New York, for the suits it is intended to affect are pending in New York (*See 2 Kent Com.*, 11th ed., 595; *Pomeroy agt. Ainsworth*, 22 *Barb.*,

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120; *Bowen* agt. *Newell*, 13 *N. Y.*, 290; *Le Bretton* agt. *Miles*, 8 *Paige*, 261; *Bell* agt. *Bruen*, 1 *How. U. S.*, 552; *Thompson* agt. *Ketchum*, 4 *Johns.*, 285; *Hyde* agt. *Goodnow*, 3 *N. Y.*, 269).

Second. It is no defense under the laws of Ohio (*See R. S. of Ohio*, vol. 1, page 905; *Laws of Ohio*, 1857, page 94).

Third. It is no defense under the laws of New York. (*See 4 R. S. [Edmonds ed.]*, page 450; *Laws of N. Y.*, 1838, chap. 257.

V. The motion, in any view of the case, should be denied, with costs in each action.

JAMES C. SMITH, *J.*—The motion is based on an alleged irregularity in the proceedings on the part of the plaintiff, and is also addressed to the discretion of the court.

The alleged irregularity is the want of due notice of trial. But the notice served on Mr. Sittser, the surviving attorney of the defendants, after the death of his partner, was regular and sufficient. The plaintiff's proceedings were regular, and, if they were not, the motion to set them aside for irregularity is too late, more than a year having elapsed since the payment was rendered, and the defendants had notice of it.

So far as the motion is addressed to the discretion of the court, the principal ground urged for it is that the defendant ought to have an opportunity to set up in his answer the discharge of his copartners. To this there are insuperable objections.

In the first place, it is not probable that the matter alleged would constitute a defense if it were pleaded. The compromise between Saxton and Dodge, though made in the state of Ohio, was made in view of the laws of this state, and there can be no doubt, that in consideration of all the circumstances attending it, its effect is to be determined by the laws of this state. The papers read on this motion show very satisfactorily that when the compromise was made, the partnership had been dissolved. That being the case, the

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compromise was valid under the laws of this state, and did not discharge Stevenson from his liability. (*Laws* 1838, *chap.* 257.)

But waiving the question of the merits of the proposed defense, the delay and the conduct of the defendant with reference to the compromise, have been such that he ought not to be permitted to set it up at this late day, as matter of favor. His correspondence shows that he was informed of the compromise soon after it was made, and several months before the trial. Also, that he was informed of the trial and its result, in the fall of 1870. No satisfactory excuse is shown for his neglect to move in season. The claim that he was ignorant of the legal effect of the compromise, is no excuse. It appears very clearly, by his own letters, that when he was informed of the compromise, he acquiesced in it, and executed certain promissory notes with the intention of delivering them to Saxton for the purpose of carrying out the compromise. Afterwards he recalled the notes, and declined to deliver them, on the sole ground that he was unable to pay, and, as late as the 26th of September, 1870, he wrote to plaintiff, promising to pay him when able. That letter was written several days after the causes were noticed for trial, and from its tenor and other circumstances, disclosed by the papers, it is apparent the defendant was informed of the fact that the causes had been noticed when he wrote the letter. In short, the case looks as if the defendant, having full knowledge of the compromise and of the plaintiff's proceedings in the action, made up his mind that it was useless to defend, as he was unable to pay, and the plaintiff would be unable to collect any judgment he might recover.

In addition to all this, is the circumstance that an action in equity has been commenced against Stevenson and others, to enforce the judgments, in which action Stevenson appeared and joined issue, as long ago as in November, 1871.

Motion denied, with ten dollars costs.

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N. Y. SUPERIOR COURT.

ANNA HORN agt. MATTHEW T. BRENNAN, Sheriff, &c.

A judge at special term has no power to make a waiver of a material issue in the pleadings a *condition* of opening a default and inquest taken at the trial term. Such an order is appealable as involving a substantial right.

*General Term, December, 1873.**Present, Chief Justice BARBOUR, Justices CURTIS and VAN VORST.*

AN inquest was taken in Part I for the sum of \$5,000, in April, 1873.

On motion made before judge SEDGWICK at special term in May, 1873, to open the default and set aside the inquest, the defendant was allowed to come in and defend upon the issue raised in the pleadings as to the value and quantity of the plaintiff's chattels alleged to have been seized and sold on the execution against William Horn, the plaintiff's husband, but the issue of title in the husband to the chattels was excluded from the answer. The opening of the inquest and setting aside the default, was made conditional upon the withdrawal from the answer by defendant of all allegations of the plaintiff's want of title to the chattels, &c. From this conditional order reducing the issues to an assessment of damages the defendant, the sheriff, appealed and made a motion to stay plaintiff's proceedings pending appeal, and also for a commission.

MONELL, J.—The defendant may have an order that a commission issue, as asked for in the order to show cause, but without a stay of proceedings. It is evident that any testimony taken under the commission can be made available only upon a reversal of the order opening the default, and

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therefore until the condition reducing the issues to a mere assessment of damages is removed no testimony to be taken under the commission can be used.

The pending appeal from the order containing the condition, will ~~waive~~ the question both of its appealability and of the power of the court to make such a condition, and I think there is sufficient in the nature of the order appealed from to bring it within the question affecting a substantial right, and therefore making it appealable. At least I cannot say the question is free from doubt, whether the condition was unauthorized is a question to be disposed of on the appeal, and is fairly raised by the appeal (*Allen agt. Maper*, 20 *Wed. R.*, 633).

There must be a stay pending the appeal to the general term.

T. C. CRONIN & A. GOODWIN, *for appellant*.

E. LAUDERBACH & H. MORRISSON, *for respondent*, claimed that the order was not an appealable one, and that the condition in the order was in the power of the judge at special term to make.

Mr. chief justice BARBOUR delivered the opinion of the court orally, and *held*,

First. That, as the order of the judge at special term denied the right of trial by jury of the issue made by the pleadings as to the plaintiff's title to the chattels, it denied a substantial right and the order was an appealable one.

Second. That the judge, at special term, had not the power to make a waiver of a material issue in the pleadings a condition of opening a default and inquest taken at the trial term. That the power was confined to the question of costs and proceedings in the case if, in the opinion of the judge at special term, the default was excused.

Third. That the order of the judge at special term is reversed and the case restored to the calendar for trial, upon all the issues, on payment of plaintiff's costs up to the time of inquest.

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N. Y. COMMON PLEAS.

ANDREW J. CROFUT and others agt. JOHN BRANDT.

The *sheriff* is not entitled to any other fees than those expressly allowed by statute.

Where a judgment is recovered in the marine court, and a transcript filed with the county clerk, such judgment becomes a judgment of this court, and, on an execution issued thereon, the sheriff is entitled to the same fees as if the judgment was recovered therein.

If the execution had issued on the judgment in the marine court, no greater poundage could be claimed. (*Per J. F. DALY, J.*)

On an execution the sheriff's poundage is limited to two and a half per cent on two hundred and fifty dollars, and one and a quarter per cent on the excess of two hundred and fifty dollars. His charge for advertising sale is limited to two dollars, with one dollar additional if the execution is stayed after advertising and before sale. His fee for receiving and entering execution is fifty cents, and for return thirteen cents; and for travel, if not more than one mile, six cents.

The sheriff, on execution, is not entitled to claim expenses paid to keepers, nor for charges for cartage or storage, nor auctioneer's charges for selling goods, except when he sells by an auctioneer at the request of the party, nor charges for insurance, nor for cataloguing goods, nor for refunding purchasers' deposits.

If any claim arises in the sheriff's favor for extra services outside the scope of his official duty, his remedy is by action. Such claim or claims or expense cannot be allowed on taxation which is limited to the adjustment of statutory fees only.

If the case of *Smith agt. Baldwin* (9 *John. R.*, 228) is an authority for the sheriff's extra charges it should not be followed, as it has been, in principle, overruled by subsequent cases. (*Per J. F. DALY, J.*)

General Term, February, 1874.

Before Judges LOEW, LARREMORE and J. F. DALY.

IN this case the plaintiffs recovered judgment against the defendant in the marine court for \$989,31; a transcript thereof was filed in the office of the clerk of the city and county of New York; execution was issued out of this court,

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and the sheriff levied upon the defendant's goods. The defendant caused the sheriff's bill to be taxed by one of the judges of this court; from the taxation the sheriff appealed to the general term. The facts appear in the following opinion of the judge on the taxation.

ROBINSON, *J.*—The execution in this case was issued out of this court to the sheriff against the property of the defendant, upon a judgment of the marine court, which, by virtue of the filing of a transcript in the office of the clerk of the city and county of New York, under the provisions of section 64 of the Code, became a judgment of this court. It directed the levy and collection of the amount of the judgment, \$989,31, with interest from July 9th, 1872, and on the next day the sheriff levied upon sufficient property of the defendant, consisting of straw and other kinds of hats, and office furniture, situate at 99 Spring street, to satisfy the execution, which was at once advertised for sale. The sale, however, was not commenced until July 16th, when, as it was being proceeded with, it was stopped by an injunction, and whatever deposits had been made by purchasers were refunded them. Under this condition of the case the following bill is presented for taxation by and on the part of the sheriff, for his fees and charges:

1. Poundage on an execution of \$989 31	\$25 98
2. Levy and return.....	2 69
3. Expenses keeping and watching property where levied on.....	150 00
4. Labor, boxing property, &c.....	20 00
5. Amounts paid for cartage.....	110 50
6. Storage and insurance.....	45 00
7. For services preparing goods for sale, and cata- logue on sale and on refunding deposits on service of injunction.....	65 00
Total.....	<u>\$419 17</u>

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The sheriff, as well as all other public officers are, at common law, entitled to no compensation for performing any acts of official duty, but by statute certain amounts, by way of fees, are allowed to be received and collected by them, but there is a general prohibition against their taking or receiving any other or greater fee or reward for any service than that allowed by law (2 *R. S.* 630, § 5); also from demanding any fee or compensation allowed by law for any service, unless it is actually rendered (*id.*, § 6), and any violation of these provisions is made a misdemeanor, and the person guilty thereof is made liable to the party aggrieved in treble damages (*id.*, § 7). It is also made the duty of every court, at which a grand jury is summoned, to charge it specially to inquire into any violation of law (*Chap. 455 of the Laws of 1841*, § 17). Notwithstanding these guards against extortion by public officers, the bill presented, I regret to say, is but a specimen of those emanating from the sheriff's office that are brought to the notice of this court. By statute that officer is allowed, for serving an execution for the collection of money, six cents per mile for traveling to make service, for going from the court-house; for collecting the sum of \$250, two cents and five mills per dollar, and for every dollar collected more than \$250, one cent and two and a half mills; advertising goods and chattels for sale, two dollars, and if the execution be stayed or settled after advertising and before sale, one dollar; for returning a writ, twelve and a half cents (2 *R. S.*, 644 § 33); and by the act of 1850, chapter 225, section 1, he is allowed a further fee of fifty cents for receiving and entering the execution. I find no warrant in any of the statutes for any other charges in addition to these fees for expenses or disbursements incurred in executing such a process. In certain other cases provision is made for his compensation, expenses and disbursements, to wit, by act of 1830, chapter 300, section 57, in certain proceedings by way of attachment in addition to specified fees, he is to be awarded such additional compensation for his trouble and expenses in taking

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possession and preserving the property attached, also for making an inventory and appraisal and for drafting and copying the inventory, as may be certified or allowed by the taxing officer. So by section 215 of the Code on claim and delivery of personal property he is allowed his lawful fees for taking, and his necessary expenses for keeping the same; and by section 243 on proceeding under a statute authorized by the Code, the same fees and compensation for services, and the same disbursements as are allowed for like services by chapter five of title 1 of part 2 of the Revised Statutes (2 *R. S.*, 1 to 12), which, according to 2 Revised Statutes, 646, may be allowed him in addition to his fees, that is, such compensation for his trouble and expenses in taking possession and preserving the property attached, as the officer issuing the warrant shall certify to be reasonable. These enactments making express provision for the sheriff's expenses in other cases, also preclude any implication that is to be tacitly understood that any not mentioned are to be allowed on executions against property.

The sheriff, as well as all other public officers, accepts office upon condition of performing its entire duties for such compensation as is specifically allowed by express provision of law, and without right to claim any other remuneration. This necessarily includes and limits the power of the officer to delegate to any other person any right to any such extra compensation which he could not himself claim. The fees allowed are not *quis quid honorarium*, but are for doing or performing the service. The officer takes his office *cum onere*, as well with its honors and profits as with the duty of performing each service required of him by law, however onerous, expensive or responsible. He takes the good with the bad, the cases that are remunerative with those that are expensive, and for such compensation as the law specifically affords. As to some duties, the labor and responsibility may be trifling in comparison with the reward, while as to others it may be wholly inadequate for the trouble and hardship

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incident to the particular case. In respect to executions for the collection of money, he may, in some cases, collect large sums by voluntary payment or seizure of coin, and easily gain his fees, while in others he may be involved in great trouble and expense in capturing and holding the property until he can effect a sale. Yet in the latter case the law affords him no greater indemnity or remuneration for the service of the execution, notwithstanding any hardship or expense encountered, than in the former. In either case he can only demand or receive the legal fees and allowances made by the statute intended for all cases. Even a promise to pay him extra compensation for extra services in the performance of his official duty or such acts as are incident thereto is void (*Chitty on Contracts*, 582; *Hatch agt. Mann*, 15 *Wend.*, 44). And, as senator Tracey in the latter case says, "that a public officer whose fees are prescribed by statute, may maintain an action to recover an additional sum promised him by a party for doing his official duty is a monstrous proposition, fraught with every kind of mischief. The pretense that it is for extra services, would cover any conceivable corruption or extortion." Whatever care, labor or expense the condition of the property levied on in this case required, the sheriff was bound to provide, and except as to existing liens, bear as part of his official duty beyond what his fees afford him by way of compensation (*Buckle agt. Bewes*, 5 *D. & R.*, 495; 3 *B. & C.*, 688; *Bilke agt. Havelock*, 3 *Camp.*, 374; *Slater agt. Haine*, 7 *M. & W.*, 413; *Hatch agt. Mann*, 15 *Wend.*, and cases there cited).

As to the extra charges, not specifically allowed by statute, the right to charge by way of taxable fees for any expense for keepers, has been repudiated in *Downing agt. Marshall* (37 *N. Y.*, 380), *Lynch agt. Meyer* (3 *Daly*, 256), *Lord agt. Richmond* (38 *How.*, 173). So as to auctioneer's charges in selling the goods, because he is bound to make the sale of the goods himself (*Chitty on Contracts*, 583; *Woodgate agt. Knatchbull*, 2 *T. R.*, 157; *Crocker on Sheriffs*, 2d ed., § 1,

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162). It is only where he sells the goods by an auctioneer at the request of some party that he can make any claim against him for the expense (*Buckle & Bares, supra*). As to cartage and storage, his duty was not, as in the case of an attachment, to keep and preserve the property until the further order of the court, but at once to advertise and sell the goods. If any right of action exists upon the part of the sheriff for extra services or expenses outside the scope of his official duty, it must be pursued against the party at whose request they have been rendered, and constitute no lien on the property levied on. They cannot be allowed on taxation, which is limited to the adjustment of mere statutory fees. Under these views the fees of the sheriff, as properly taxable in the present case, are as follows:

Poundage on \$989,31, and interest to August 16,	
\$9.91; \$997.21, on \$250, at $2\frac{1}{2}$ per cent.	\$6 25
On \$747.21, at $1\frac{1}{4}$ per cent.	9 35
Advertising sale of goods	2 00
Fee after advertising and before sale	1 00
Receiving and entering execution	50
Travel, one mile	06
Return	13
Total	<u>\$19 29</u>

At which amount the bill* is taxed, and the other or excessive charges are disallowed.

BROWN, HALL & VANDERPOEL, *for the sheriff and appellant.*

First. The sheriff is by law entitled to the actual expenses necessarily incurred by him in the collection of an execution (*Gallager agt. Egan*, 2 *Sandf.*, S. C., 744; *Bright agt. Supervisors, &c.*, 18 *John.*, 243; *The People agt. Hilton*, 12 *Wend.*, 267; *Smith agt. Birdsall*, 9 *J. R.*, 328).

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Second. The statute contemplates the taxing of fees other than those specifically named by it.

Title 4 of chapter 10, part 3, Revised Statutes, provides:

"§ 2. The allowance of any fees by this chapter, *shall not apply to any case where special provision is made by law for any particular service*; but the fees for *such service* shall be such as are provided in the statute requiring the service or providing the compensation therefor" (3 *R. S.*, 5th ed., 930).

The same chapter title 5, provides:

"§ 1. Upon the settlement of an execution by a defendant, or upon settling any suit or demand, the sheriff or attorney claiming any fees which shall not have been taxed, shall, upon being required by the defendant, and on his paying the expense thereof, have his fees taxed by some proper officer of the court in which the action may be pending or from which the execution shall have been issued" (2 *R. S.*, 5th ed., 932).

Title 3 of chapter 10, already referred to, provides:

"For the *following services*, hereafter done or performed in the several courts of law or equity in this state, by the officers thereof, or in any proceeding authorized by law, the *following fees* shall be allowed." And then follows the fee bill, including the fees allowed to sheriff.

Third. The fees and charges presented by the sheriff for taxation are reasonable and proper and should have been allowed. They were necessary in preserving the property which the process of the court commanded him to hold.

Fourth. The cases cited in the opinion do not impair the right to compensation here claimed.

Hatch agt. Mann was an action on a promise of extra compensation beyond the prescribed statutory fee for a specified service.

Downing agt. Marshall, arose on a question of allowances to counsel under the Code.

Lynch agt. Myers, it will be seen was decided upon the theory that it was predicated on defendant's promise to pay

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“keeper’s fees,” as the certificate of the taxation of those fees by judge CLERKE shows.

Fifth. The poundage charged on sheriff’s bill was correct and the reduction erroneous.

Laws of 1813 (*chap.* 86, *R. L.*), created the “court of assistant justices in the city of New York,” also “justices courts in the city of New York,” and marshals’ and constables’ fees in both these courts were the same, as follows:

*	*	*	*	*	*	*	*	*	*
For serving execution for \$2.50 or under.....	\$0	25							
For every \$2.50 thereafter.....			6						

By the laws of 1819 (*chap.* 71), the “justices court in the city of New York” shall be called “marine court of the city of New York.” No change was made in the matter of marshals’ and constables’ fees.

Laws of 1820 (act of April 7th), provided that constables and marshals in suits in courts of assistant justices, &c., have *same* fees (on execution over \$25), as in the marine court; and the laws of 1824 (*p.* 293), allowed constables fees in these courts on execution, at five cents on every dollar thereof for fifty dollars or under, and two and a half cents on every dollar above that sum.

By the laws of 1857 (*chapter* 295), it was provided * * “hereafter all other process (than summons) issuing out of said marine court, shall be directed to and served by the sheriff,” &c.

§ 2. * * * “And the same fees shall be paid for the service of any summons or *other process* as are *now* required to be paid for the same.”

By this last law, the fee to which the sheriff is entitled is the same as that received by the constable. The fee attaches to the process. The only objection urged to this, is the provisions of section 68 of Code, that marine court judgments shall, after filing of transcripts, have the same effect as a lien, and be enforced in the same manner as and be deemed a judgment of the court of common pleas.

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The "effect" and the manner of "enforcing" the *judgment* cannot affect the statutory fees on the *execution*. And the statute giving the fees was passed in 1857, *six years* after the passage of section 68 in the present form.

C. BAINBRIDGE SMITH, *for defendant and respondent.*

First. At common law a sheriff had no right to take fees for performing any acts of official duty (*Dew agt. Parson*, 1 *Chitty R.*, 29; *S. C.*, 18 *E. C. L. R.*, 87; *Sherley v. Packer*, 1 *Rolls.*, 313; *Bacon's Abr.*, "Fees," *A.*; *Com. Dig.*, "Fees," 1).

Second. By statute the sheriff is allowed to take certain specified fees, and he is prohibited from taking or receiving any other or greater fees for any services than those prescribed (2 *R. S.*, 630, §§ 5, 6, 7; 2 *id.*, *Edmonds' ed.*, 663, § 38; *id.*, 669, § 5; *Laws of 1850*, chap. 225; *id.*, 1847, chap. 455, § 17; *Downing agt. Marshall*, 37 *N. Y.*, 380).

1. The sheriff has no authority to charge for keepers' fees in watching the property (*Lynch agt. Meyer*, 3 *Daly*, 256; *Lord agt. Richmond*, 38 *How. Pr. R.*, 173; *Dooley agt. Root*, 13 *Gray*, 303; *Krum agt. King*, 12 *Calf.*, 417; *Mathers agt. Ramsey*, 2 *Disney [Ohio]*, 334; *Searle agt. Blaise*, 14 *Com. B. N. S.*, 856; *Halliwell agt. Heywood*, 10 *Weekly R.*, 780; *Bilke agt. Havelock*, 3 *Camp.*, 374; *Buckle agt. Bewes*, 5 *D. & R.*, 498; *S. C.*, 3 *B. & C.*, 688).

2. The sheriff is not allowed for expenses paid for labor or cartage (*Mathews agt. Ramsey*, 2 *Disney [Ohio]*, 334; *Phillips agt. Canterbury*, 11 *Mees. & W.*, 608; *Davies agt. Edmonds*, 12 *id.*, 30).

3. The sheriff is not allowed for storage and insurance (*Browning agt. Hanford*, 5 *Hill*, 588).

4. Nor for services in preparing goods for sale (*Searle agt. Blaise*, 14 *C. B. N.*, 856; *Phillips agt. Canterbury*, 11 *Mees. & W.*, 618).

5. Nor for any service or disbursement not provided for

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by the Revised Statutes (*Hatch* agt. *Mann*, 15 *Wend.*, 49; *Benedict* agt. *Warrener*, 14 *How. Pr. R.*, 568; *Davies* agt. *Edmonds*, 12 *M. & W.*, 30; *Bussier* agt. *Pray*, 7 *S. & R.*, 447).

Third. As the judgment had been paid by the defendant, the sheriff had no lien upon the goods he levied upon for any fees whatever (*Croft* agt. *Merrill*, 14 *N. Y. R.*, 456; *Jackson* agt. *Anderson*, 4 *Wend.*, 474; *Sherman* agt. *Boyce*, 15 *John.*, 443).

J. F. DALY, *J.*—The facts appear in the opinion of the judge at special term, whose order is appealed from. For the reasons stated in that opinion, the order should be affirmed.

The authorities cited by the sheriff on the argument before us do not conflict (except the case of *Smith* agt. *Birdsall* 9 *Johns.*, 328, of which notice is taken below), with the conclusion therein arrived at. In *Gallagher* agt. *Eagan* (2 *Sand. Sup. Ct.*, 744), the plaintiff, in an action for the foreclosure of a mortgage was allowed to tax, as a disbursement, thirty-seven and one-half cents each for serving notices of object of action. The sheriff served the notices, and, the plaintiff having paid him, desired to tax the disbursement.

The court said that the expense was necessarily incurred, and was a reasonable disbursement, that it was unimportant whether the sheriff served them or whether any other person did. That it was not allowed as sheriff's fees, but was given for an unofficial act, which could be done by any other person as well; thirty-seven and one-half cents was allowed, as under the statute that was the fee allowed in the court of chancery for the same service.

In the case of *Bright* agt. *The Supervisors of Chenango*, (18 *Johns.*, 243), the county clerk was directed by statute to procure the necessary books for recording deeds, &c., and was also directed by statute to send certain notices to judges and justices of the peace.

The statute did not provide for payment. On his applica-

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tion a mandamus was allowed to the supervisors of Chenango county to allow him his disbursements for the books and notices, because the books were not for the benefit of the officer, but the public. The tenure of his office was during pleasure, and its emoluments were, in most cases, moderate, and in some very small; the books became permanent records and the property of the county, and the sending of the notices was for the benefit of the county.

In *The People ex rel. Hilton agt. The Supervisors of Albany* (12 Wend., 257), the county judge was required to attend at the county clerk's office and witness the drawing of juries for the common pleas and mayor's courts. No compensation was provided by statute. A mandamus was allowed to the supervisors to audit his claim for compensation for such services, because the practice of the court had been to allow public officers compensation for the performance of duties for which no compensation is provided by law, and the legislature, knowing such practice (as it was assumed), had made no enactment to the contrary, thus tacitly approving it, and this service had no connection with the judge's judicial duties.

It will be seen that in the two latter cases the charge was allowed as a public charge against the county for a public service, and not as an allowance to a defendant or party to an action for extra trouble in enforcing process against him, and there is no analogy between them and the case at bar. It will be noticed that in the case of Bright the tenure and emolument of office are considered in allowing his claims. If such considerations are to enter into each case, it can hardly be contended that any rule exists for the allowance.

In the case first cited (*Gallagher agt. Eagan*), extra allowance was not made to the sheriff, but to the plaintiff in the action, and the court expressly declared that it was allowed not as fees to the sheriff, but as a disbursement for a non-official act which any person might have performed.

In *Smith agt. Birdsall* (9 Johns., 328), the sheriff, Smith,

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recovered judgment against Birdsall for \$61.68 fees and disbursements for arresting him on an attachment for contempt, and taking him to Albany. The court said the charges were reasonable and just, and no more than an indemnity; the defendant was in contempt and liable to the costs and expenses of the attachment; the *habeas corpus* act allowed a mileage for bringing up a prisoner and taking him back if remanded; and that where the law is silent as to charges for particular services, the court, if they allow anything, must allow what is reasonable.

If this case might have been considered authority for such charges of the sheriff as those made in the present matter, it cannot be followed in view of the decision in *Hatch* agt. *Mann* (15 *Wend.*, 44), and *Downing* agt. *Marshall* (37 *N. Y.*, 380).

In the latter case it is said, that persons acting in *autre droit* as executors, administrators, guardians, receivers, &c., are, upon a faithful execution of their trusts, to be indemnified out of the trust property for all expenses necessarily incurred in the faithful performance of their duties. But the sheriff is in no sense here intended a trustee. Nor does he act in *autre droit* in taking property of the judgment debtor on execution.

The case of *Hatch* agt. *Mann* (*supra*), has been cited in this court at general term, 1859 (*Dows* agt. *McGlynn* 6 *Abb.*, *Pr. R.*, 242), as authority for declaring an agreement to pay extra fees to a constable, a void agreement, and the supreme court at special term (August, 1873, *Fowler* agt. *The Mayor, &c.*, DANIELS, *J.*) has followed the decision of this court in the order appealed from, and disallowed the sheriff's charges for keeper's fees.

In the matter of poundage on the execution, it seems that the sheriff is entitled to no more than upon executions issued upon judgments of this court. This judgment of the marine court, the transcript having been filed with the county clerk, is to be deemed a judgment of this court (*Code*, § 68; com-

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pare amendment of 1851 with the section as enacted in 1849).

The execution having been issued out of this court, is therefore an execution to enforce a judgment of this court, and not of the marine court. The fee bill as to poundage on executions *issuing out of the marine court*, cannot apply even if any authority were shown, for the poundage claimed on such executions. The act of 1824 (*page 293*), under which the charge is made, of five cents for every dollar under fifty dollars, and two and one-half cents for every dollar over fifty dollars for serving executions, relates only to courts held by justices of the peace, and the city and county of New York is expressly excepted from it. The fees allowed by the act of 1813 (*chap. 86, R. L., vol. 2*), viz., twenty-five cents for serving execution of \$2.50 or under, and six cents for every \$2.50 thereover, were repealed by the act of 1833 (*chap. 313*), and no other statute that I can find, establishes for the marine court, the fee for serving execution, payable to constable, marshal or sheriff.

Order appealed from affirmed.

LOEW, J.—This is doubtless a hard case for the sheriff, but there is no authority in law for allowing him such charges and expenses upon the levying of an execution, as are claimed by him.

At common law the sheriff was not entitled to charge anything for executing process (*Coke Lit.*, 368, *b.*; *Woodgate agt. Knatchbull*, 2 *T. R.*, 158; *Dew agt. Parsons*, 2 *Barn. & Ald.*, 565).

The right to exact compensation was first given by statute (23 *H. b. c.*, 9, 10; 29 *Eliz. c.*, 4), and these early statutes gave a certain amount per pound upon the sum collected by the levying of an execution, afterwards called poundage, and in regard to other services in the execution of process, the fees the sheriff might take for the same were specifically fixed, and, in respect to others, he might take what he and the

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justices could agree upon (*Dalton's Sheriff*, c., 119). Coke says, in referring to these and other statutes, that the sheriffs cannot take anything except *where and so far as* these statutes have allowed them (*Coke Lit.*, 368 b).

With us sheriff's fees have been regulated by statute since colonial times. Our statutes have always allowed poundage upon the levying and satisfaction of an execution, even though the sheriff may not sell the property levied upon (2 *Rev. Stat.*, 645; *People agt. Adams*, 1 *Code Rep.* [N. S.], 226; *Bolton agt. Lawrence*, 9 *Wend.*, 437), together with certain other specific allowances for services connected with executions and other process.

The right of the sheriff to compensation has been recognized in cases which have been regarded as outside of the statutes, some resting upon long established custom, of which instances are given in *Dalton's Sheriff*, pp. 468, 469, or where the service is not in any suit or process, but for the benefit or use of the county, which are the cases enumerated by judge DALY. But I know of no case, and apprehend that none can be found, in which it has been held that an expense incurred by the sheriff in taking charge of the property levied upon, or in guarding it, or in arranging it for sale, can be deducted by him from the amount collected upon the execution, or recovered by him in any form; all such expenses, charges and services being embraced in the general allowance made to him upon executions called poundage.

But, on the contrary, there are cases holding otherwise. Thus, in *Buckle agt. Bewes* (5 *D. & R. Y.*, 495, 3 b. & c., 688), where the sheriff retained, out of the proceeds of a sale upon execution, the expense he had been put to in keeping the goods, pending an injunction in chancery, it was held to be a taking of more than the poundage allowed by the statute of 29 *Eliz.*, c., 4, and that he thereby incurred the penalty of the statute against extortion. In *Slater agt. Hames*. (7 *Mees. & W.*, 413), the sheriff deducted from the proceeds of a sale upon execution, expenses incurred in

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taking precautions to prevent a rescue of the goods, the expense of removing them for sale, and the auctioneer's commissions, all of which he was ordered by the court to refund, upon the ground that he was only entitled to poundage under the 29 *Eliz.*, c., 4, and such fees as were allowed by the table of fees in 7 *Will.*, 4, and 1 *Vict.*, c., 55, and see, to the same general effect, *Woodgate* agt. *Knatchbull* (*supra*), *Phillips* agt. *Canterbury* (11 *Mees. & W.*, 619), *Matthews* agt. *Ramsay* (2 *Disney* [*Ohio.*], 334), *White* agt. *Madison* (26 *N. Y.*, 127), *Lynch* agt. *Meyer* (3 *Daly*, 256).

For these reasons, in addition to those given by judge DALY in his opinion, I agree that the order appealed from should be affirmed.

Noe agt. Christie.

N. Y. SUPERIOR COURT.

HANNAH M. NOE, administratrix of ISAAC D. HAMMOND,
deceased, agt. JOHN S. CHRISTIE.

An *execution* against the person of the judgment debtor, can be issued only to a county within the jurisdiction of the court, after the return of an execution against his property returned unsatisfied in whole or in part (*Code*, § 288).

The defendant in this case being in the custody of the sheriff of the city and county of New York, under and by virtue of an execution issued against his person, upon a judgment of this court, plaintiff had no right to issue subsequently upon the same judgment, another execution against defendant's person to the sheriff of Richmond county.

The arrest under the first execution, was a satisfaction of the judgment while the imprisonment continued; and the issuance of the second was in direct violation of the provisions of the Revised Statutes (2 *R. S.*, 364, § 7; 3 *id.*, 5th ed., 643, § 7).

While the defendant was under arrest under the aforesaid execution, another execution against his person, was issued to the county of Richmond where he resided, upon another judgment against him in this court.

Held, that both executions be set aside, with costs.

At Special Term, January 3, 1874.

MOTION to vacate two executions issued against the defendant's person to the sheriff of the county of Richmond.

E. J. PATTISON, *for the motion.*

H. T. MURSTON, *opposed.*

FREEDMAN, *J.*—An execution against property may be issued to the sheriff of any county where the judgment is docketed, and several such executions may be issued at the same time to different counties (*Code*, § 287).

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But by the terms of section 288, an execution against the person of the judgment debtor, can be issued only to a county within the jurisdiction of the court, after the return of an execution against his property unsatisfied, in whole or in part.

The defendant being in the custody of the sheriff of the city and county of New York, under and by virtue of an execution issued against his person upon the judgment for \$1,896.13, plaintiff had no right to issue subsequently upon the same judgment, another execution against defendant's person, to the sheriff of Richmond county. The arrest under the first of these executions, is a satisfaction of the judgment while the imprisonment continues; and the issuance of the second was in direct violation of the provisions of the Revised Statutes (2 *R. S.*, 364, § 7; 3 *R. S.*, 5th ed., 643, § 7).

The execution against defendant's person issued to the sheriff of Richmond county upon the judgment for \$124.18, was, perhaps, properly issued, provided the action is one in which the jurisdiction of this court does not depend upon the personal service of the summons upon the defendant within the territorial limits of the city and county of New York (*See Landers agt. Staten Island R. R. Co.*, 14 *Abb. [N. S.]*, 346), and provided an execution against the property of the defendant was first duly issued to said sheriff, and by him returned unsatisfied. Neither of these facts was made to appear or was claimed to exist, although it did appear that defendant at the time of his arrest in New York under the execution first above referred to, was a resident of the county of Richmond. For this reason the execution for \$124.18 must also be set aside.

Motion granted and executions set aside with ten dollars costs.

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COURT OF APPEALS.

CHARLES S. BRYCE, appellant, agt. THE LORILLARD FIRE
INSURANCE COMPANY, respondent.

A policy of insurance misstated the section of a warehouse in which the property intended to be insured was located as section C, whereas it was really section A.

The sections were in reality separate buildings, and so considered and surveyed for purposes of insurance.

The misstatement was written in the policy, on the applicant's instruction, to insure property in Patterson's stores C (the Patterson stores being the warehouse), the insurer supposing that C meant section C of the warehouse.

At the time of applying the applicant had with him, for the purpose of effecting the insurance, the warehouse receipt given upon the storage of the property in the Patterson stores, and describing the property, but not specifying the section in which it was.

The receipt contained, in the upper left hand corner, the following: "C, No. 51;" the C referring to the book from which the receipt was cut, and the 51 being the number of the receipt. He did not deliver the receipt to the insurer, or instruct him as to the locality of the property, otherwise than to insure in Patterson stores C.

The insurer would have insured in A as readily as in C.

The property was destroyed by a fire, burning section C before it consumed A.

In an action brought to reform the policy and recover under it, judgment was given for the defendant. The plaintiff's only important exceptions on the trial, were to evidence showing the character of the sections as separate buildings. He, however, stated no ground of objection. There was evidence upon which all the judge's findings of fact, and his additional findings and refusals to find, could be based.

The judgment was affirmed at the general term.

Held, that the findings could not be disturbed; as in order to a review by this court of a finding of fact, there must be no evidence to support it; and in order to such review of a refusal to find a fact, the evidence in favor of the proposed finding must be clearly conclusive.

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That the policy could not be reformed, as there was neither a mistake of both parties whereby the intentions of both parties failed of expression, nor a mistake of one party causing a failure to express his intention, with a fraudulent attempt in the other party to take advantage of such failure.

Wells agt. *Yates*, 44 *N. Y.*, 525, distinguished.

Coles agt. *Bourne*, 10 *Paige*, 534, followed.

That the statement of the location of the property, written in the policy upon the application of the insured, was a warranty, and its truth a condition precedent to any liability on the part of the insurer, though its truth is not essential to the risk, nor an inducement to the insurer.

The latent ambiguity to which the statement is subject, does not destroy its character as a warranty; that such ambiguity may be, and in this case is, explained. That the character of a warranty, as such, does not depend on the degree of obscurity or perspecuity of its expression.

The West. Ins. Co. agt. *Cropper* (32 *Penn.*, 351), and *F. Ins. Co.* agt. *Updegraff* (43 *id.*, 350), distinguished.

That the maxim "*Falsa demonstratu non nocet*" does not apply; in order that this maxim should apply, there must be, after casting out the false, enough left to constitute an adequate, sufficient description, pointing out, with convenient certainty, the property intended.

That the evidence taken against the plaintiff's exception was competent.

THIS was an action, brought in the superior court of the city of New York, for a reformation of a policy of insurance, and a recovery for a loss under the policy as reformed.

The plaintiff claimed, through two assignments, under the party to whom, by the terms of the policy, any loss thereunder was payable.

The complaint, after stating in the usual manner a cause of action, for a loss under the policy, by the destruction by fire of the property, twenty-seven barrels of whisky therein insured, set forth, in the words of the policy, the description of the property insured, as follows: "Merchandise * * * contained in letter C Patterson Stores, So. Front, below Pine street, Philadelphia;" and then alleged that the said merchandise consisted of the said twenty-seven barrels of whisky, and was, at the time of the issuing and delivery of said policy, and thereafter, up to and at the time of the happening of the fire aforesaid, in letter A of the said Patterson stores. That,

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nevertheless, the said merchandise consisting of whisky aforesaid, was intended to be, as well by the defendants as by said Larens (Larens being the insured), "insured as merchandise then kept and thereafter to be kept in said section letter A in the said building, and was in fact there insured, and the statement that the same was in section letter C in said building, as in the description clause stated, was wholly through inadvertance and mistake, and was not, in fact, according to the contract of insurance as made between said Larens and the defendants."

The answer denied the assignments, and also all that part of the complaint just above quoted, beginning with the words "That, nevertheless, the said merchandise consisting of whisky, as aforesaid," and alleging a mistake in describing the location of the whisky insured.

The answer also set up as a defense, that Larens, at the time of the insurance, represented to the defendant that the said merchandise was contained in the building known as letter C, Patterson stores, south front, below Pine street, Philadelphia, and that such representation was written in the policy, forming part of it, and was false.

The issues raised by this answer were tried at special term, before the Hon. SAMUEL JONES, on the 20th day of March, 1871, and, on the 30th of December, 1871, a decision was rendered, directing the dismissal of the complaint on the merits, with costs to the defendant.

The court found, as facts, *first*, that, the assignments set forth in the complaint had been duly made; and, *second*, that the policy as it stood, and as it was alleged in the complaint, truly represented the contract as made between the defendant and Larens; and as conclusions of law, *first*:

That Larens was not insured against, and the plaintiff could not recover for, the loss alleged in the complaint; and, *second*, that the plaintiff was not entitled to have the policy reformed. Judgment was duly entered on the decision.

The plaintiff excepted to the second finding of fact, and

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to both the conclusions of law, and appealed from the judgment.

Upon the settlement of the case the plaintiff proposed additional findings, some of which the judge found as proposed, and some of which he refused to find as proposed, but found in a modified form; to the refusals to find and to the modified findings the plaintiff excepted.

The judge found that Larens had twenty-seven barrels of whisky stored in the Patterson stores, South Front below Pine street, Philadelphia; which warehouse was divided into eight sections, known as sections A, B, C, D, E, F, G and H, and received for the whisky a warehouse receipt not specifying the section of the warehouse in which the whisky was stored, and upon the upper left hand corner of which was the following: "C, No. 51;" that the letter C referred to the book from which the receipt was taken, and not to the section of the warehouse; and the words No. 51 indicated the number of the certificate; that Larens employed an insurance broker named Brown to effect insurance on said whisky, and handed to Brown the warehouse receipt "for that purpose;" that Brown applied to the defendant's agent, Lancaster, to effect the insurance, and "apparently reading from a memorandum in his hands, instructed Lancaster to insure whisky in Patterson stores, C;" that Lancaster understood the letter C mentioned in such instructions, referred to compartment C of the Patterson stores; that Larens did not either personally, or by his agent, Brown, make any representation to the defendant as to the location of the whisky, other than such instruction.

That with the exception of section H, which was erected later than the rest of the warehouse, there was no break either in the front or rear walls of the warehouse; that the sections were separated by substantial brick walls with no connection save for heating apparatus, and an iron shafting running through from H to A, the arches which existed between the sections being filled in with brick; that the fire

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commenced at H and proceeded to A, and the whole warehouse was destroyed; that the defendant would have insured the whisky in A as cheerfully as in C; that Larens had no knowledge in what particular section of the warehouse the whisky was stored, or until after the fire, that the words "letter C" had been inserted in the policy.

The judge refused to find that the warehouse was "subdivided" into sections, but instead thereof found as above, that it was "divided;" and refused to find that Larens handed Brown the warehouse certificate "as furnishing the requisite information to enable him to effect the insurance," but instead thereof found as above, that he employed him to effect the insurance and handed the receipt to him "for that purpose," and refused to find that on the application for insurance, Brown handed Lancaster the receipt and left it with him to enable him to make out the policy, but instead thereof found as above, that Brown "apparently reading from a memorandum, instructed Lancaster to insure whisky in Patterson stores, C;" and refused to find that Lancaster supposed the letter C on the warehouse receipt, meant section C of the warehouse; but instead thereof found as above, that Lancaster understood the letter mentioned in Brown's instructions to him to refer to compartment C of the warehouse; and refused to find that there was no representation to the defendant as to the location of the whisky other than appears in the receipt, but instead thereof found as above, that there was no other representation than Brown's instructions.

Though the evidence before the trial was not entirely without conflict, yet there was evidence upon which all the findings and refusals to find, may be based.

The plaintiff objected to the defendant's asking whether Lancaster would refuse to take a risk in one section of the warehouse and accept a risk in another; whether he represented several companies; whether in making a survey of the warehouse for the purposes of insurance, the different sections were surveyed and considered as separate buildings;

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and (the plaintiff having shown that the sections had a shaft running through them) whether shafts do not frequently run through a whole row of entirely different buildings built at different times; but he stated no ground for any of his objections. The objections were overruled and exceptions taken by the plaintiff. Under these objections it was testified that whether the agent would refuse a risk in one section and accept one in another, would depend on the amount of insurance he had in any one section; that he represented ten companies; that in surveying the warehouse for purposes of insurance, the sections were surveyed and considered as separate buildings, and that shafting does frequently run through a row of entirely different buildings built at different times.

The appeal was heard at the general term on the 11th of March, 1873, before MONELL, FREEDMAN and CURTIS, JJ., and a decision rendered on the 5th day of April, 1873, affirming the judgment below. MONELL, J., writing the opinion and his associates concurring.

The appeal to this court was argued on the 2d of December, 1873, and the decision rendered on the ninth of the same month.

AUGUSTUS C. FRANSIOLI, *for appellant*, cites as to the cases in which a written contract may be reformed, 1 *Story Eq. Jur.*, § 155; *Wells agt. Yates* (44 *N. Y.*, 525); *Cole agt. Bowne* (10 *Paige*, 534). As to the responsibility of the defendant for the mistake in the policy, *N. Y. & Wash. Print. Tel. Co. agt. Dryburg* (35 *Penn. St.*, 298). As to the mode in which a warranty must be expressed, 2 *Parsons on Con.* (5th ed., p. 492 and note c). As to the responsibility of the defendant for obscure statements in a policy, *The Western Ins. Co. agt. Cropper* (32 *Penn. Stats.* [8 *Casly*], 351, 355); *Franklin Fire Ins. Co. agt. Updegraff* (43 *Penn.* [7 *Wright*], 350); *Parsons on Con.* (5th ed., 506, note n). As to the explanation, by parol evidence, of technical expressions in a particular trade or business, 1 *Greenl. on Ev.* (§§ 278,

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277, 280); 2 *Parsons on Cont.* (5th ed., p. 555). To the effect that untrue representations, in order to effect the right to recover, must be material and fraudulent, *Burrett agt. Saratoga Ins. Co.* (5 *Hill*, 188); *Galis agt. Madison Co. Ins. Co.* (2 *Com.*, 49). As to the maxim, "*Falsa demonstratio non nocit*," and its applicability to this case, *Burr agt. Broadway Ins. Co.* (16 *N. Y.*, 267); *Strong agt. North Am. F. Ins. Co.* (*Gen. Term*, 6th *Dis.*); *Yonkers & N. Y. F. Ins. Co. agt. Hoffman F. Ins. Co.* (6 *Robt.*, 316); *Tyler agt. The New Amsterdam F. Ins. Co.* (4 *Robt.*, 151); *Lohnes agt. Rutgers F. Ins. Co.* (3 *Keyes*, 416).

CARLISLE NORWOOD, Jr., *for respondent*, cites, as to the cases in which a written contract may be reformed, *Pennell agt. Wilson* (2 *Abb. Pr.* [*N. S.*], 466); *Boardman agt. Davidson* (7 *Abb. Pr.* [*N. S.*], 439 [*p.* 441]). As to warranty in the law of insurance, *Angell on Fire and Life Ins.* (§ 140); *Flanders on Fire Ins.* (204); *De Halm agt. Hartly* (1 *Tenn. Rep.*, 385); *Jennings agt. The Chenango Co. Mutual Ins. Co.* (2 *Denio*, 75); *Chase agt. Hamilton Ins. Co.* (20 *N. Y.*, 57); *Kennedy agt. St. Lawrence Mutual Ins. Co.* (10 *Barb.*, 289); *Wall agt. E. R. Mutual Ins. Co.*, (7 *N. Y.*, 370); *Lappin agt. Charter Oak Fire and Marine Ins. Co.* (58 *Barb.*, 348); *Shoemaker agt. Glens Falls Ins. Co.* (60 *Barb.*, 100); *Pierce agt. Empire Ins. Co.* (62 *Barb.*, 636); *Angell on Ins.* (§ 754); *Delonguemans agt. The Tradesmen's Ins. Co.* (2 *Hall*, 589); *Ripley agt. Aetna Ins. Co.* (30 *N. Y.*, 157, *citing many cases*); *The First National Bank of Ballston Spa agt. The Prest., &c., of the Ins. Co. of North America* (50 *N. Y.*, 45). As to the review in this court of findings of fact and refusals to find, *Colwell agt. Lawrence* (38 *N. Y.*, 71); *Metcalf agt. Mattison* (32 *N. Y.*, 464); *Doty agt. Carolus* (31 *N. Y.*, 547); *Ostrander agt. Fellows* (39 *N. Y.*, 350); *Finch agt. Parker* (49 *N. Y.*, 1 [*p.* 8]). To the effect that objections to evidence are not reviewable in this court, when they are unaccompanied by any statement of

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their grounds, *Shaw* agt. *Smith* (3 *Keyes*, 316); *Kenne* agt. *Clark* (2 *Abb. Pr. Rep.* [N.S.],); *Ayrault* agt. *The Pacific Bank* (47 *N. Y.*, 576); *Erickson* agt. *Smith* (38 *N. Y.*, 473).

FOLGER, *J.*—The several exceptions to findings of fact, and to refusals to make findings of fact as requested, are not well taken. To make a legal error in a finding of fact which this court may review, there must be no evidence in the case upon which the finding may be based. To make such error in a refusal to find, the evidence must be clearly conclusive in favor of the finding proposed. There was, in this case, evidence on which each of the findings can be based; and there is evidence which will sustain each of the refusals to find. The learned justice who tried the cause has seen fit to rely upon that evidence, and we may not review his action in that respect.

The claim of the plaintiff that the contract of insurance was erroneous through mistake and should have been reformed is not tenable.

The mistake which will warrant a court of equity to reform a contract in writing must be one made by both parties to the agreement, so that the intentions of neither are expressed in it; or it must be the mistake of one party by which his intentions have failed correct expression, and there must be fraud in the other party in taking advantage of that mistake and obtaining a contract with the knowledge that the one dealing with him is in error in regard to what are its terms.

The findings show that the defendants made just the contract which they from the first intended to make, and just the one which they understood the plaintiff's assignor meant to make. Whatever may have been the intention of the insured or his agent, there is nothing in the findings nor in the evidence, which shows or has a tendency to show that the defendants or their agents purposed anything else than to insure property in section C of the Patterson stores. Such being

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the case, it is not in the power of the court to reform the instrument, for thereby violence will be done to the intentions of the defendants. Nor is there found fraud in the defendants or their agents. Nor is there evidence which would warrant such findings.

The case cited by the plaintiff of *Wells* agt. *Yates* (44 N. Y., 525), is not analagous to this. That was the case of a mistake in the attempt by the vendor to perform, by the execution of a conveyance, a pre-existing contract for the sale of land. The assignee of the vendor, knowing that the conveyance did not contain an exception stipulated for in the contract, and that the vendor was in an error in omitting it, still accepted the deed and refused to correct the mistake, intending to reap the profit of it. The conveyance was then reformed on the ground of the fraud of the assignee of the contract, and on the ground that it was an erroneous performance of a contract as to the terms of which there was no dispute. These two conditions cannot be predicated of the contract in the case in hand.

Nor is this case like unto *Cole* agt. *Bowne* (10 *Paige*, 534). There the chancellor refused to enforce a contract for purchase of land resting in parol, on the ground that the vendee did not understand and intend it as the vendor did. The vendors were seeking to enforce a contract, as they claimed it to be against one who denied the making of that contract, and averred that he made another and different one. Specific performance was refused, because the doubt was so great whether both the parties understood alike the agreement to be implied from the defendant's bid. To allow this contract of insurance to be reformed and then enforced, would be to do just what the court then refused to do, for here as there, the defendants did not understand the terms of it, as they are claimed by the plaintiff to have been, and to impose it upon them in those terms, would be to make a contract for them which they did not intend to enter into.

The policy of insurance is then to be taken as the contract

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of the parties. It was, then, a contract to insure property contained in letter C, Patterson stores, South Front, below Pine street, Philadelphia. And that description of the place of deposit of the property, written into the policy in accordance with the application of the insured, was a warranty by him of its particular location, and the truth of that warranty became a condition precedent to any liability to him from the defendants. And it was a warranty and a condition precedent, not to be avoided by the fact that the truth of the description was not essential to the risk, nor an inducement to the defendants to enter into the contract. This rule is so well established in the law of insurance as that it must be adhered to, though it may work hardship in a particular case.

Nor does it depend upon its freedom from a susceptibility to a double interpretation that a description is a warranty, whatever is expressed, whether with perspecuity or obscurity, that is what is warranted. Other rules then come in to assist in the discovery of what the language means. If there be latent ambiguity that may be removed by testimony. And here there is a latent ambiguity.

The language here used is the language of the parties. It does not assert, and therefore warrant, that the property is "contained in letter C, Patterson stores, &c." The phrase "letter C," taken by itself, has a meaning. But by reason of collateral matter and extrinsic circumstances, an ambiguity arises. It had an especial or technical meaning to those engaged in the business of putting property on storage in the Pennsylvania warehouse, and to those who solicited and who wrote insurance upon it. When the testimony gives that meaning, it indicates but one thing, that part of the Patterson stores which is designated to owners of property and to insurers of it as the section or division C thereof. It is impossible to say, in the light of all the circumstances disclosed by the pleadings and the testimony, that letter C of the Patterson stores is not section C thereof, and that a description of property, as that "contained in letter C, Patter-

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son stores," does not mean property deposited in that division of that warehouse known and designated as letter C. It is impossible to say that it does mean property mentioned in a book C of the proprietors of that building.

The doctrine maintained in *The West. Ins. Co. agt. Cropper* (32 Penn., 351), and *F. Ins. Co. agt. Updegraff* (43 id., 350), will not aid the plaintiff. Those cases hold that if the clauses of a policy be obscure, it is the fault of the insurer, for he it is who has penned the language, so that if it be capable of two interpretations, that must be adopted which is most favorable to the insured.

There is not room here for but one interpretation. "Letter C Patterson Stores," has but one meaning. The latent ambiguity prevents that being seen on the bare reading of the phrase; when that ambiguity is done away with, by the testimony, there is no difficulty in interpreting the words and reaching their sense.

The plaintiff invokes the aid of the maxim "*Falsa demonstratio non nocit.*" It may be conceded that there is a false description of the location of the property. But that is not enough to bring into operation the rule embodied in that maxim. There must be in the description so much that is true, as that casting out that which is false, there is still enough left to clearly point out the place in which is the property.

Indeed, an authoritative definition states, and qualifies the rule more narrowly than this, viz.: "As soon as there is an adequate and sufficient definition, with convenient certainty of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it" (*Broom's Leg. Max.*, 464 [605]). But it needs not so to restrict in the case in hand. The phrase, "letter C," as meaning the place of storage of the property, is a false showing. If that phrase is rejected, then the whole description is contained in the words "Patterson stores, So. Front, below Pine street, Philadelphia." These words do, as far as they go in meaning, tell

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the truth as to the situation of the property. They do not, though, tell the whole truth, nor the whole essential truth. The word Philadelphia alone would tell the truth, but not the whole of it. To be made certain of the exact place of deposit of the property for the purposes of this contract, it needed not only to know in what city it was, and in what street therein, but in what building in that street; and if that building is so constructed as to be of many divisions, practically separate each from the other, for safety from fire, and treated as distinct in making contracts of insurance, certainty of description needed some explanation of what division it was in. This was the office of the phrase "letter C." If that phrase be rejected and no other truthful phrase be inserted, the description fails to show just where in the Patterson stores the property was placed. That phrase, though false, did harm; for it pointed the description to the wrong place, and some equivalent for it was needed to complete a truthful description.

The evidence taken against the objection of the plaintiff was competent. It was to show that this part of the description, though wrong, was harmful, and, therefore, not to be rejected. It was to show that though there was a warehouse known as the Patterson stores, it was one made up of several divisions, as distinct for the purpose of storage of property and of the insurance of it against fire as the dwelling-house in a block, and that to know the place of the property needed the naming of the section of the building in which it was, as much as if the risk had been on household goods, their situation would not have been pointed out short of the expression in the description of the number of the house in the block.

We are of the opinion that the defendants established a strict legal defense to the action of the plaintiff; as we sit here to declare the law and not to propound a code of morals, we must sustain it. The judgment appealed from must be affirmed, with costs to the respondents.

FOLGER, J., reads for affirmance. All concur.

Stapenhorst agt. American Manufacturing Co.

N. Y. SUPERIOR COURT.

JACOB STAPENHORST, *et al.*, plaintiffs and respondents, agt.
THE AMERICAN MANUFACTURING COMPANY, defendant
and appellant.

Where on the trial in an action of *negligence*, the evidence given is not of such a character as would authorize the court to determine the diligence or negligence of either side as matter of law, the questions relating thereto on both sides should be submitted to the jury.

Where plaintiffs' witness was allowed to testify against defendant's objection and exception, that from the first of January to the first of June of the preceding year, plaintiffs had about 200 customers, from which they realized a profit of not less than \$1,000 per month, and which subsequently were all lost.

Held, that the reception of this evidence was erroneous for several reasons. 1st. The complaint did not allege the *names* of said customers. 2d. It did not even contain an averment of loss of customers as an item of *special damage* in general terms. 3d. The evidence already given, showed affirmatively that no damage had occurred prior to 1889, and consequently the testimony related to a period too remote in any aspect of the case.

General Term, November, 1873.

Before BARBOUR, C. J., MONELL and FREEDMAN, JJ.

APPEAL from judgment entered upon the verdict of a jury in favor of the plaintiffs for \$1,759.59.

WILLIAM HENRY ARNOUX, *for appellant.*

MOODY B. SMITH, *for respondents.*

By the Court, FREEDMAN, J.—The complaint alleged that the defendant let and rented to plaintiffs the first floor and basement of certain premises, situated on the corner of Mott and Hester streets, in the city of New York; that the plaintiffs

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occupied the demised premises for the manufacture of French and German mustard; that during the same time the defendant occupied the upper stories of said premises for manufacturing umbrella frames; that from the first of May, 1868, to June, 1869, oil, impregnated with iron filings, or particles of iron, finely pulverized, leaked, through the negligence of the defendant, through from the defendant's premises into plaintiff's mustard mills; that in consequence thereof great damage has been done to plaintiffs' business; that a great deal of their mustard has been ruined thereby; that the character and reputation of their manufactured mustard has been ruined, and that their business has been greatly injured thereby; that the plaintiffs have been damaged in the premises in the sum of \$25,000, and that said damage has been done without any negligence on the part of the plaintiff.

The gravamen of the charge, therefore, was negligence on the part of the defendant in carrying on its business operations in that part of the premises occupied for that purpose. Such negligence is not a positive element, but it consisted, if it existed, in a mere omission to do something which the law required under the circumstances, or, in other words, in a want of diligence without positive intention to injure the plaintiffs. The law required that in carrying on its operations the defendant should use due diligence to prevent injury to the plaintiffs; that is to say, the defendant was bound to use the same amount of care, caution, attention and discretion, as the ordinary prudent man would put forth under precisely the same circumstances. The plaintiffs were bound to use similar diligence to guard against injury. The want or omission on either side of such care, caution, attention or discretion, constituted negligence. Thus the duty of such diligence, &c., and, consequently the negligence, was relative on both sides; that is, relative to the actual situation of affairs and the means of knowledge of the parties. The questions, therefore, had to be determined upon *all* the circumstances of the case, of which the relation of landlord and tenant was

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but one, and a comparatively unimportant one; and in determining them it became necessary for the learned judge below, and for the jury, if the case was rightfully sent to them, to place themselves in the position of the persons whose acts had to be judged. The evidence given upon the trial, when considered in the light of these principles, was not of such a character as would have authorized the court to determine the diligence or negligence of either side as matter of law, and, consequently, the questions relating thereto on both sides had to be submitted to the jury as questions of fact. For this reason, defendant's exception to the refusal of the court to dismiss the complaint is clearly untenable. The case could not be disposed of on the simple theory that, as between landlord and tenant, the landlord is not bound to repair without express covenant.

A more serious question is presented by the exceptions relating to the reception of certain evidence and to certain portions of the charge that bear upon the question of damages. Evidence had been given that plaintiffs' business had extended to the principal cities of the United States, and of the manner in which it was conducted. That in March or April, 1869, mustard commenced to be returned by plaintiffs' customers on the ground of its bad quality, and that in the course of some further time all the mustard manufactured between the first of January and the month of June, 1869, was thus returned. That on investigation the said mustard was found to be utterly worthless, and that it had to be thrown away. That, therefore, numerous attempts were made by plaintiffs to discover the cause, and that for that purpose, and at great expense, the mills were frequently stopped, cleaned up and thoroughly inspected, and chemical analyses were made of the mustard and of the materials that entered into its manufacture. And that finally it was discovered that oil, impregnated with iron, was leaking from defendant's premises into plaintiffs' mustard mills, and, to all appearances, had been thus leaking for some time, and that this had

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worked the injury. Evidence had also been given of the quantity of mustard thus lost, of its market value in a sound condition, and of the expenses incurred by plaintiffs in discovering the cause of the difficulty and in obviating the injurious effects produced. Then it happened that Julius Wolff, one of the plaintiffs, on being recalled, was allowed to testify, against defendant's objection and exception, that from the first of January to the first of June of the preceding year, plaintiffs had about 200 customers, from which they realized a profit of not less than \$1,000 per month, and which subsequently were all lost. This ruling was erroneous for several reasons. The complaint did not allege the names of said customers. It did not even contain an averment of loss of customers as an item of special damage in general terms. No such loss could, therefore, be proven (*Hallock* agt. *Miller*, 2 *Barb.*, 630; *Tobias* agt. *Harland*, 4 *Wend.*, 537). The evidence already given showed affirmatively that no damage had occurred prior to 1869, and consequently the testimony objected to related to a period too remote in any aspect of the case. For the damage complained of not being the result of intention, but of negligence, the law holds the defendant responsible only for such results as sprung naturally, *i. e.*, according to the usual course of things, from defendant's negligent acts, unaffected by extraneous causes. Upon any such result the said testimony had no legitimate bearing, and that it may have prejudiced the defendant, becomes apparent when it is considered in connection with the charge. The jury were instructed that in case they found that the negligence of the defendant was not occasional, but general and continuous, in the language of the law, gross, they should, in addition to the market value of the goods actually spoiled, and the interest thereon, find from the evidence what damage was done to the business of the plaintiffs, and should also give them compensation for the loss of time and for the trouble that they were put to. Plaintiffs' counsel requested the court to charge, further, that if the defendant was guilty

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of gross or of reckless negligence, it is liable for the injury to the good-will of plaintiffs' business. This proposition the court submitted to the jury by saying, "I charge you that in effect, except I prefer not to use the words 'good-will of the business,' but to say the damage done to the business, as it has been given in evidence before you," This was equivalent to saying that the jury had a right to consider the testimony objected to in determining the aggregate amount of damage.

The error committed in the reception of said testimony cannot, therefore, be disregarded, and this being so, it is unnecessary to express an opinion on the questions raised by the remaining exceptions.

The judgment appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

BARBOUR, C. J., and MONELL, J., concurred.

NOTE.—The complaint avers that in consequence of the negligent acts of the defendant "great damage had been done to plaintiffs' business; that a great deal of their mustard has been ruined thereby; that the character and reputation of their manufactured mustard has been ruined, and that their business has been greatly injured thereby; that the plaintiffs have been damaged in the premises in the sum of \$25,000." Now, how could the plaintiffs show what damages they had sustained, unless they could introduce evidence to prove the amount of their prior sales and the subsequent loss thereof in consequence of their ruined article, returned to them by their lost customers? Surely no averment of special damage in the complaint is necessary to authorize such evidence. It is a part of the legitimate damages arising out of the substantive cause of action.

It would appear to be a new mode of pleading where a loss of customers is averred as a cause of damage, to insert the *names* of such customers to authorize evidence to be given of their loss. It would seem that the names, occupation, residence, &c., of such customers, are matters of evidence entirely.

The witness objected to stated, that from the first of January to the first of June of the *preceding year*, plaintiffs had about 200 customers, &c. If this meant the year 1868, the testimony would not be very remote in showing prior sales and income to losses in 1869.—REP.

Evans agt. Holmes.

SUPREME COURT.

ALFRED J. EVANS and another agt. EUGENE L. HOLMES.

On a motion to vacate an *order of arrest*, the defendant may elect whether he will informally demur to the plaintiffs' case, set forth in the original affidavit as insufficient to warrant the arrest, thus presenting the naked legal question on undisputed averments of fact, or whether he will open the merits of the whole controversy by moving on counter-affidavits, raising issues of fact and proceed to an informal trial on affidavits.

But he cannot in legal effect, pursue both methods at the same time, by selecting as the subject of denial and dispute, such portions only of the plaintiffs' case as he may deem most easily disproved, and thus debar the plaintiffs from strengthening other portions by incontestable evidence, which on the original proof, perhaps, could hardly be sustained.

Where the defendant, therefore, on a motion to discharge from arrest, upon all the affidavits and papers used on both sides, strenuously resisted the reception of an additional affidavit which the plaintiffs had procured, substantiating the charge of fraud on an averment made in their original affidavit, on the ground that the defendant had not assailed the truth of this particular averment in his moving affidavits, but rested his objection as to this point, solely on the insufficiency of the original affidavit.

Held, that the additional affidavit of the plaintiffs must be received and read, which established the fact in question beyond dispute.

Broome Special Term, January 13, 1874.

MOTION to set aside an order of arrest. Action to recover the price of goods sold and delivered to the defendant. At the time of commencing the action, the plaintiffs on an affidavit procured an order of arrest under subdivision 4 of section 179 of the Code, alleging that the defendant had been guilty of a fraud in contracting the debt. The affidavit, among other things, averred that the credit was obtained upon a false and fraudulent representation of the defendant, "that he was worth between five and six thousand dollars over and above all debts and liabilities against him; and that

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there then was on deposit in his name and to his credit, in the Scranton Savings Bank at Scranton, Pa., sufficient money to pay said amount," &c. "That such statements were false and untrue to the knowledge of the defendant, and that he made them with intent to defraud the plaintiffs herein of said goods." "That said defendant has in his possession or control, a correct book of account of deposits and drafts between himself and said Scranton Savings Bank, the production and due authentication of which would show the truth of said representation as to his deposit, if the same were true, which book said defendant has refused to show to the plaintiffs' attorney herein."

The motion is made on affidavits denying that the defendant made the representations in question, but there is no denial or dispute of the allegation in the original affidavit on which the order was granted, that the defendant had no money on deposit at the Scranton Savings Bank. The plaintiffs in opposition to the motion read new affidavits showing the making of the representations as alleged, and also an affidavit from the cashier of the bank showing that the defendant had no money on deposit there and never had any money to his credit at the bank. The defendant's counsel objected to the reading of the cashier's affidavit on the ground that no affidavits had been read on this point for the defendant, and insisted that the original affidavit on which the order was granted, was in this respect incurably defective.

T. F. McDONALD, *for motion.*

W. L. GRISWOLD, *contra.*

COUNTRYMAN, *J.*—As the cause of arrest is not identical with the cause of action, I must pass on the question of fact raised in the affidavits, and I have no hesitation in holding that the defendant made the representations as claimed by the plaintiffs.

It was urged, however, that the original affidavit was fatally defective, because it contained only a general allega-

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tion of the falsity of the defendant's representations. Doubtless, as a rule, the judge to whom the original application is made, should require a statement in detail of the evidentiary facts from which the existence of the principal fact sought to be established may be inferred or verified (*Draper* agt. *Beers*, 17 *Abb.*, 163; *Smith* agt. *Jones*, 4 *Robts.*, 657). But this is not indispensable, especially where, as in this case, the fact is positively averred, and it is not impossible that the affiant had personal knowledge of its truth (*Cummings* agt. *Wooley*, 16 *Abb.*, 297, *note*; *Ballonhey* agt. *Cadot*, 3 *Abb.* [*N. S.*], 122). Even if the general averment was, in fact, made on information and belief, it does not necessarily follow that the order of arrest must be vacated. The courts have repeatedly refused to grant such applications, and have invariably done so where the motion was made on additional affidavits, unless the defendant expressly denied, under oath, the truth of the averment brought in question (*Union Bank* agt. *Mott*, 9 *Abb.*, 106; *Wolfe* agt. *Browner*, 5 *Robts.*, 602). It was held in all of these cases that the mere omission, under such circumstances, to deny the averment, would be regarded for all the purposes of the application as an admission of its truth (*Union Bank* agt. *Mott*, 9 *Abb.*, 106; *Wolfe* agt. *Browner*, 5 *Robts.*, 602; *Ballonhey* agt. *Cadot*, 3 *Abb.* [*N. S.*], 122).

But it is not necessary in this case to invoke any technical rule against the defendant. The plaintiffs produced, in opposition to the motion, the affidavit of the cashier showing, beyond cavil, the falsity of the defendant's representation that he had any money on deposit in the Scranton Savings Bank. The reception of this affidavit was strenuously resisted, on the ground that the defendant had not assailed the truths of this particular averment in his moving affidavits, but rested his objection as to this point solely on the insufficiency of the original affidavit. And it was, therefore, insisted that the plaintiffs were not at liberty to reinforce this point in their case with any new proof. The defendant

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might, at the outset, it is true, have merely objected to the original papers as affording insufficient grounds of arrest, by moving solely on those papers to vacate the order, and thus have presented the naked legal question on undisputed averments of fact. But he preferred to assail the truth of some of the plaintiffs' allegations by other affidavits, and thus raised issues of fact for the decision of the court. By pursuing this course he reopened the whole controversy on its merits, so far as the same was presented in the original affidavit, and submitted all those questions *de novo* upon all the papers. There is no limitation on the right of the plaintiffs to produce affidavits or proofs in addition to those on which the order of arrest was obtained, where the motion to vacate is made upon affidavits on the part of the defendant (*Code*, § 205), except that the plaintiffs cannot set up, as a defense to the motion, a new cause not originally alleged as a ground of the arrest (*Cady, President, &c. agt. Edmonds*, 12 *How.*, 197). The defendant may elect whether he will informally demur to the plaintiffs' case, set forth in the original affidavit, as insufficient in law to warrant the arrest, or raise issues of fact and proceed to an informal trial of the controversy on affidavits. But he cannot in legal effect pursue both methods at the same time, by selecting as the subject of denial and dispute such portions only of the plaintiffs' case as he may deem most easily disproved, and thus debar them from strengthening other portions by incontestable evidence, which on the original proof, perhaps, could hardly be sustained. If the rule were otherwise the defendant by such an artifice might fail, as in this case, on all the issues he raised in his affidavits, and yet succeed in his application simply because the plaintiffs, from haste or inadvertence, or momentary inability to procure better evidence, had rested the allegation of a material fact, which the defendant could not, however, really dispute, on very doubtful or equivocal proof. Such a result would defeat the obvious policy of this provision of the Code, which was to reopen the whole case to both parties,

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whenever the motion to vacate the order is made on new affidavits, and thus enable the court to determine the propriety of the arrest as an original question on all the papers.

In this view all the cases cited on the argument may be harmonized. The case of *Draper agt. Beers* (17 Abb., 163) arose on a motion to vacate the order on the original papers, and the case of *Smith agt. Jones* (4 Robts., 657) was an *ex parte* application for the original order, which was denied. But in all the other cases cited, the question arose, as in this case, on a motion to set aside the order of arrest, on new affidavits. Hence, in these cases, the court, in weighing the evidence, laid stress on the omission of the defendant to deny the allegation in question, while controverting other allegations of fact; and held such omission, in connection with the allegation of the plaintiffs, to amount to an admission of the fact as alleged (*Union Bank agt. Mott*, 9 Abb., 106; *Wolfe agt. Browner*, 5 Robts., 602; *Ballonhey agt. Cadot*, 3 Abb. [N. S.], 122). The case of *Martin agt. Vanderlip* (3 How., 265) is not an authority for a different doctrine. In that case the plaintiff did not offer to read additional affidavits in opposition to the motion, and the order of arrest was sustained on the original affidavit as against the moving affidavit of the defendant. The question, therefore, as presented here could not have been raised, and does not appear to have been considered in that case. The affidavit of the bank cashier must be received and read, which establishes the fact in question beyond dispute, and the motion must be denied, with ten dollars costs.

Carnes agt. Platt.

N. Y. SUPERIOR COURT.

WILLIAM R. CARNES (substituted as plaintiff in place of MARTHA B. CARNES, deceased), plaintiff and respondent, agt. GEORGE W. PLATT, impleaded, &c., defendant and appellant.

This case has been three times before the general term of this court. The first time reported in 6 *Robt.*, 270, where the facts are fully stated; the second time, reported in 1 *Sweeny*, 140.

The court of appeals decided, after the second trial, that certain questions in the case should be tried, as questions of fact, before a jury. On this trial, a verdict for the plaintiff was rendered on these questions (as had been on the two former trials), and the defendant moved, at special term, on a *case and exceptions*, to set aside the verdict and for a new trial, which was denied, and from such order of denial, as well as the judgment, defendant appealed to the general term.

Held, that it may be questioned whether, under the provisions of the Code, it is not the duty of the general term, in such a case, to examine the evidence, for the purpose of ascertaining whether the verdict should stand. Such examination having been made, it was decided that there was no reason for disturbing the verdict.

Several exceptions were taken by the defendant to the refusal of the court to allow certain evidence offered by him to be submitted to the jury. The most important one was rejected because it called for the disclosure of confidential communications between attorney and client.

It has long been settled, that professional communications between a party and his professional adviser, although they do not relate to any litigation, either commenced or anticipated, are privileged where the *solicitor* is the party interrogated. This privilege now extends equally to both parties.

General Term, November, 1873.

Before BARBOUR, Ch. J., MONELL and FREEDMAN, JJ.

APPEAL by defendant from judgment in ejectment, award-

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ing plaintiff an estate for life in the premises described in the complaint, with a right to the present possession.

A statement of the facts appeared in 6 *Robt.*, 270.

JAMES C. CARTER, *for appellant.*

DANIEL T. WALDEN, *for respondent.*

By the court, FREEDMAN, J.—This is the third time that this case comes before the general term of this court. On each of the two former occasions (6 *Robt.*, 270, and 1 *Sweeny*, 140) it was held that the facts of the case as disclosed by the evidence, were not sufficient to establish that Houghton delivered the deed in question to Wetmore for the use of Anthony, absolutely and with intent to pass the title to Anthony prior to the 10th of August, 1854, the date of the record of the judgment of the Merchant's Bank of Boston against Houghton, and that Wetmore so received it; and that consequently there was, as matter of law, no absolute delivery and acceptance before that day. The court of appeals, however, decided that it was for the jury to determine these questions as questions of fact, in view of all the circumstances surrounding the transaction. On the third trial this was done, and the jury, under a charge which was quite favorable to the defendant, determined these questions in favor of the plaintiff. And although some other questions were formally presented by a motion to dismiss the complaint, yet the point that the evidence authorized no other verdict than a verdict for the defendant, was raised neither by that motion nor by a request for the direction of a verdict. The defendant throughout the trial treated the case as one that could be determined only by the jury, and having done so, if his motion for a new trial had been made solely on the judges' minutes, he would not, in the absence of error, be entitled to argue now that the verdict is against the weight of evidence (*Rowe agt. Stevens*, 12 *Abb. [N. S.]*, 389). But as the motion appears to have been subsequently made on a

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case and exceptions, and the appeal is from the order of the special term denying such motion as well as from the judgment, it may be questioned whether, under the provisions of the Code, it is not the duty of the general term to examine the evidence for the purpose of ascertaining whether the verdict should stand. I have, therefore, made such examination, but have been unable to find anything in said evidence that under the law applicable to the case, as finally settled by the court of appeals, would warrant a disturbance of the verdict.

The counsel for the defendant requested the court below to submit to the jury, as a question for them, whether the assignment of the judgment to Martha B. Carnes, was procured by Charles W. Houghton and for his benefit, without any intention to retain a lien or security on the judgment for the money advanced to obtain the assignment. The court refused to submit this question to the jury and to such refusal defendant's counsel duly excepted. The law applicable to this branch of the case must, for the purposes of this appeal at least, be deemed to have been laid down in the opinion delivered by Mr. justice MONELL on the second appeal. This opinion was the opinion of the court on that occasion, and not a mere concurring opinion as erroneously reported in 1 *Sweeny* (p. 145). The same request was substantially made in that case, and the question now presented was, therefore, necessarily involved in the decision enunciated. The law as there laid down, stands unreversed to this day and must, for that reason, still control. It is true, the evidence given on the present trial so far as it relates to the request now under consideration, was more voluminous than that given on the preceding trial. But when tested by the rules laid down in the opinion of Mr. justice MONELL above referred to, it was in legal effect no stronger than on the preceding occasion, and consequently the request for its submission to the jury, was properly denied.

The offer of the defendant to prove by the witness Litch, that he was originally employed by Charles W. Houghton in

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relation to enforcing this judgment against the property described in the complaint, and in consequence of advice from the witness, arrangement was made between Chas. W. Houghton and Mr. Carnes, that Mr. Carnes should procure an assignment of the judgment in his own name or that of some third person, and that the subsequent proceedings, in order to enforce the judgment, should be had under the direction of such assignee, was properly excluded for the reasons, (1) that because, so far as it went, it was insufficient to establish a defense, and (2) because it called for the disclosure of confidential communications that had passed between an attorney and his client. It has long been settled, as was pointed out by WIGRAM, V. C., in *Walsingham v. Goodricke* (3 *Hare*, 124), that communications between solicitor and client, made pending litigation, and with reference to such litigation, or made before litigation, but in contemplation of and with reference to litigation which was expected and afterward arose; or made after the dispute between the parties followed by litigation, but not in contemplation of or with reference to such litigation, are privileged from disclosure, whether the party interrogated be the solicitor or the client. It has also been settled that professional communications between a party and his professional adviser, although they do not relate to any litigation either commenced or anticipated, are privileged where the *solicitor* is the party interrogated. This privilege now extends equally to both parties (*Minet* agt. *Morgan*, 21 *W. R.*, 467; *L. R.*, 8 *ch.*, 361; *Williams* agt. *Fitch*, 18 *N. Y.*, 546, 550; *Britton* agt. *Lorenz*, 45 *N. Y.*, 51, 59). The renewal of the last offer with the addition that the offered proof was to be confined to what occurred between the witness and Houghton, and that it was to be connected subsequently with proof that Mr. Carnes was made cognizant of the arrangements—not by this witness—and assented to it and came into it, was also properly rejected. It was open to the same objections as the first offer and to the additional one that the proposed evidence was clearly not competent

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unless the plaintiff was connected with it. The refusal to receive it before such connection was made, was a matter resting in the discretion of the court and, therefore, not the subject of an exception.

The remaining exceptions appear to be equally untenable.

The judgment and order appealed from should be severally affirmed with costs.

BARBOUR, C. J., and MONELL, J., concurred.

Church agt. Miller.

SUPREME COURT.

WILLIAM CHURCH, respondent, agt. JAMES H. MILLER, appellant.

On an appeal by the plaintiff from a judgment of a justice's court, rendered for defendant for fifty dollars, upon a counter-claim, to the county court, where a new trial was had before a jury, who found a verdict of no cause of action against the plaintiff.

Held, that the defendant's rights not being affected by the question of offer (as none was necessary), he did not cease to be the prevailing party. He did not, it is true, establish his own claim, but he prevailed to destroy that of the plaintiff, and, therefore, his judgment before the justice was not reversed, and he was entitled to the *costs* of the action.

General Term, Second Department, December, 1873.

Present—BARNARD, P. J., GILBERT and TAPPEN, JJ.

THIS was an appeal from an order made by the county judge of Orange county, striking the defendant's costs, as taxed by the clerk, from the judgment entered in said action, and inserting therein the costs of the plaintiff. The action was originally commenced in the justice's court. The plaintiff claimed judgment for rent of house, fifty dollars; the defendant denying plaintiff's claim, demanded judgment in his own favor, by way of counter-claim, in the sum of fifty dollars and interest, for work and labor. The justice rendered judgment in favor of the defendant for fifty dollars and costs. From this judgment the plaintiff appealed to the county court for a new trial; no offer was made by the defendant.

In the county court, the cause being tried with a jury, they rendered a verdict of no cause of action, whereupon, each party claimed costs. The clerk taxed the defendant's

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costs and judgment was entered accordingly, The plaintiff moved, in the county court, to strike the defendant's costs from the judgment, and insert his own in place thereof. The motion was granted by the county judge, and an order entered in accordance therewith.

SHARPE & WINFIELD, *for respondent.*

B. R. CHAMPION, *for appellant.*

By the Court, BARNARD, P. J.—The sole question presented is as to which party is entitled to costs.

The action was brought by plaintiff against defendant in a justice's court. The plaintiff asked a judgment for rent, and the defendant set up a counter-claim for work and labor. The defendant obtained judgment against the plaintiff for fifty dollars, besides costs. The plaintiff appealed, claiming a judgment in his favor of fifty dollars. The case was tried in the county court of Orange county, by a jury, and a verdict rendered of no cause of action. The county judge has, by order, given costs to the plaintiff, and the defendant appeals. The question of costs is to be determined without regard to any question of offer made or omitted to be made.

The case, undisputedly, is one where the defendant was bound to make no offer.

The defendant was the prevailing party, and is entitled to costs by reason thereof, unless he falls within an exception or limitation created under section 371 of the Code.

The learned county judge says the judgment was wholly reversed. I do not think it was. The justice's judgment established two things: 1st. That plaintiff had no claim against the defendant; and, 2d. That the defendant had a claim of fifty dollars against the plaintiff. The plaintiff appeals and claims what he claimed before the justice, namely, a judgment in his favor against the defendant, of fifty dollars or over.

The new trial in the county court established two things:

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1st. That the plaintiff had no claim against the defendant; and, 2d. That defendant had none against the plaintiff. It was not an entire reversal of the justice's judgment; that part of it which destroyed the plaintiff's claim was upheld. If the justice's judgment had been simply for the defendant, destroying the plaintiff's claim, and the plaintiff had appealed, there would be no question as to defendant's right to costs. When the defendant's rights are not affected by the question of offer, I cannot see how he ceases to be the prevailing party. He has not prevailed, it is true, to establish his own claim, but he has prevailed to destroy the plaintiff's claim, and, therefore, his judgment before the justice was not reversed.

Order reversed, with ten dollars costs.

Moses agt. Waterbury Button Company.

N. Y. SUPERIOR COURT.

ISRAEL W. MOSES agt. THE WATERBURY BUTTON COMPANY.

Under section 241 of the Code, it is the duty of the sheriff to retain possession of the property *attached*, notwithstanding the *ex parte* approval of the undertaking by the court or officer on granting the order for the discharge of the attachment, until all objections to the sureties on plaintiff's part are either waived or the undertaking be reapproved on justification of the sureties; and any positive direction to the contrary which may be incorporated into the order of discharge, is erroneous.

The verbal consent of the attorney for the plaintiff to the entry of the usual order for the discharge of the attachment, cannot, therefore, be construed into a waiver of the plaintiff's right to except to the sufficiency of the sureties or to their justification.

At Special Term, December, 1873.

MOTION to modify order for the discharge of attachment.

FREEDMAN, *J.*—Under sections 240 and 241 of the Code, as they stood prior to 1869, a defendant after appearance in the action, could apply *ex parte* for the discharge of the attachment. Upon such application he was bound to deliver to the court or officer who had issued the attachment, the undertaking required by section 241, and upon compliance with this provision and the approval of the undertaking by such court or officer, an order was made discharging the attachment. It thereupon became the duty of the sheriff without express directions contained in the order to that effect, to deliver or pay to the defendant or his agent, all the proceeds of sales and moneys collected by him under the attachment and all the property attached remaining in his hands. The plaintiff was not entitled, as matter of right, to notice of any of these proceedings.

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By an amendment of section 241 passed in 1869, it was, however, provided as follows:

“ And the plaintiff may, within three days after receiving written notice of the filing of such undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the plaintiff excepts, the sureties shall justify on notice in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, and may retain possession of the property attached, and the proceeds thereof in his hands, until the objection to them is either waived, as above provided, or until they shall justify, or new sureties shall be substituted and justify.”

Under this provision it is the duty of the sheriff to retain possession of the property attached notwithstanding the *ex parte* approval of the undertaking by the court or officer on granting the order for the discharge of the attachment, until all objections to the sureties on plaintiff's part are either waived or the undertaking be reapproved on justification of the sureties; and any positive direction to the contrary which may be incorporated into the order of discharge, is erroneous. The provision referred to secures to the plaintiff a substantial right, of which he cannot be deprived. The verbal consent of the attorney for the plaintiff to the entry of the usual order for the discharge of the attachment in this case cannot, therefore, be construed into a waiver of plaintiff's right to except to the sufficiency of the sureties or to their justification.

The order of December twenty-fourth must be modified by striking out the words “and that all the property attached thereunder by the sheriff of the city and county of New York, remaining in his hands be delivered to the defendants or their agents, and be released from said attachment.”

In the case of *Bullard* agt. *Pearsall*, on question of costs, reported *ante*, page 383, the defendant carried the question to the court of appeals, and it was argued and affirmed April 7th, 1874.

EXPLANATION.

We have had in our possession for several years past, certified copies of old opinions of the court of appeals, which, on examination, were found not to be reported in that court, and, from their brevity, &c., it was supposed were not intended to be; and occasionally we have published one, for the sake of variety or to fill out a number of our reports, knowing that good law is never the worse for being old. But, unfortunately, the case of *Wait* agt. *Green* (*ante*, page 449) has not only been reported in the court of appeals (36 *N. Y. R.*, 556), but it is not good law. Judge BOCKES, in calling our attention to the subject, says, "and which opinion then (1867) received the concurrence of all the members of the court. But the principle of this case was afterwards very carefully reconsidered in the court of appeals (40 *N. Y.*, 314), and disapproved. Therefore, *Wait* agt. *Green* is not now authority. Still, although condemned and overruled in fact, it was reported, perhaps inadvertently, in 1872, in 62 *Barb.*, 241. The heresy of that case should not be perpetuated." In that view we concur entirely, and regret very much its appearance in the present volume.—REF.

D I G E S T

CONTAINING THE WHOLE OF

46 *How.*, ANTE, AND QUESTIONS OF PRACTICE CONTAINED IN
65 *BARBOUR*; 7 *LANSING* AND 50 AND 51 *N. Y. REPORTS*.

A.

ACCOUNTING.

1. In an action to compel an accounting, all persons interested in obtaining the account must be made parties. (*Petrie* agt. *Petrie*, 7 *Lans.*, 90.)

ACKNOWLEDGMENT.

1. Where a wife is introduced to the officer taking her acknowledgment to a deed by her husband, in the presence of his brother, both known to the officer, there is sufficient ground for his certificate of knowledge of the grantor; though, if mistaken, the deed would be avoided. (*Rexford* agt. *Rexford*, 7 *Lans.*, 6.)
2. Where the wife making an acknowledgment made no reply to the questions put by the officer as to the execution of the deed by her freely, &c.—*Held*, that her assent might be implied from her silence. (*Id.*)

ACTION.

1. An action, on behalf of the plaintiff and other tax-payers, to recover a tax alleged to have been unlawfully collected, and to restrain its disbursement by injunc-

tion, none of the other tax-payers appearing to join with him, will be regarded as the personal action of the latter. (*Kilbourne* agt. *Allyn*, 7 *Lans.*, 352.)

2. Nor will such an action lie on behalf of other tax-payers, entitled to distinct payments out of the whole tax collected; or to prevent a multiplicity of suits, where the pleadings and evidence fail to indicate any purpose of others to sue, or their dissent from the proposed disbursement of the money. (*Id.*)
3. And where it is neither alleged nor shown that other tax-payers are dissatisfied with the intended disbursement, a judgment directing repayment to them, for which they do not apply or authorize an application, cannot be sustained. (*Id.*)
4. Where a wrong-doer sells property illegally taken, the owner may waive the tort and sue for money had and received; and where the property taken is money, it may be recovered in such an action without waiting for the formality of a sale. (*Tryon* agt. *Baker*, 7 *Lans.*, 511.)
5. Where in an action against two or more defendants upon a joint contract the summons is served only upon one and judgment is perfected as prescribed by section 136 of the Code, a second action

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may be brought against all the defendants. The special remedy prescribed in such case by sections 375 to 381, inclusive, of the Code, is not inconsistent with the remedy by action, and a prohibition against such action will not be implied therefrom. The new remedy given by these sections is cumulative only. (*Lane* agt. *Salter*, 51 *N. Y. R.*, 1.)

6. An action to foreclose a mortgage given to secure a bond, wherein judgment is asked against the obligor for any deficiency, is, as to the latter, an action arising on contract, and one wherein a several judgment may be had, and hence is subject to a counter-claim of any other cause of action on contract, which such obligor had against plaintiff at the time of the commencement of the action. (*Hunt* agt. *Chapman*, 51 *N. Y. R.*, 555.)
7. An action in equity will lie to ascertain and fix the boundary lines between the lands of the parties, whenever there are peculiar equities attaching themselves to the controversy; or when it will prevent a multiplicity of suits. (*Boyd* agt. *Dowie*, 65 *Barb.*, 237)
8. When case and assumpsit were, at common law, concurrent remedies, the form of action that the pleader selected was determined by the insertion in, or omission from, the declaration, of the allegation that the defendant undertook and promised. This right of selecting remedies, and whether the action is in tort or assumpsit, must, since the Code, be determined by the same criterion. (*Booth* agt. *The Farmers and Mechanics, National Bank of Rochester*, 65 *Barb.*, 457.)
9. A tax-payer at large, of a municipality, having no private interest in the question, more than other tax-payers, cannot maintain an action in equity, as against the public authorities, to set aside or

prevent acts claimed to be illegal. (*Tift* agt. *The City of Buffalo*, 65 *Barb.*, 460.)

10. Although it has been held, in several cases, that a tax-payer cannot maintain an action, in his own name, to restrain the collection of a tax assessed upon the inhabitants of a town, village or city of which he is a resident, nor to set aside the proceedings of municipal corporations which only affect him as they do other tax-payers or inhabitants of such corporation; yet he can maintain such an action when he sustains some specific injury. (*The People ex rel. Akin* agt. *Morgan*, 65 *Barb.*, 473.)

ALIMONY.

1. An order for alimony, *pendente lite*, is superseded by the judgment. (*Wood* agt. *Wood*, 7 *Lans.*, 204.)
2. If future alimony ought to be paid after judgment, a clause to that effect should be inserted in it. (*Id.*)
3. Or if reasons exists for its payment pending an appeal, a fresh application should be made. (*Id.*)
4. It seems the rule is the same in respect to all orders made upon interlocutory applications. (*Id.*)
5. The superior court of the city of New York has jurisdiction to grant a divorce and allow alimony where the parties are properly before the court. (*Kamp* agt. *Kamp*, *ante*, 143.)
6. If, after a judgment of divorce has been rendered by that court without making any provision as to alimony, and subsequently an order of that court is made on the foot of the judgment or decree, allowing alimony and making particular provisions for its security and payment out of certain real

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estate of the defendant, this order cannot be attacked collaterally and want of jurisdiction of that court interposed as a defense in an equitable action against the defendant in the supreme court to set aside as fraudulent certain conveyances made by the defendant to avoid carrying out and performing such order for alimony. (*Id.*)

7. The jurisdiction of courts of equity to grant relief in cases of fraud and trust was not abolished by the statute which instituted a creditor's bill upon a judgment and an execution returned unsatisfied. (*Id.*)

8. But it is well settled that an action to set aside a fraudulent conveyance may be maintained by a creditor without judgment, who is otherwise remediless. (*Id.*)

9. *Held*, upon the clear weight of evidence on behalf of the plaintiff in this action, that the conveyances from the defendant to Schneider and from him to Miss Burgraff of the premises number 6 Elizabeth street, be declared to have been made with the fraudulent intent of defeating the recovery of alimony by the plaintiff from the defendant and the security which he was required to give, and that the said conveyances are void as against the plaintiff. A receiver appointed, &c. (*Id.*)

10. Alimony and allowance for expenses will not be allowed in an action for divorce brought by one claiming to be a wife, where marriage, in fact, is denied by the answer, until the actual existence of the marital relation is proved to the satisfaction of the court, or is admitted. The court, however, is not limited to the allegations of the complaint and the denials of the answer. If other legitimate proofs are submitted which make out, in the judgment of the court, a fair presumption of the fact of marriage, it has power to make the

allowances. (PECKHAM, J., dissenting.) (*Brinkley* agt. *Brinkley*, 50 N. Y. R., 184.)

ANSWER.

1. Where an answer is stricken out by the court as *sham*, without any leave given to serve a new or amended answer, the defendant is not entitled, on motion, to have the plaintiff's (regular) judgment set aside, and to be allowed to have an amended answer previously served stand. (*Schmid* agt. *Arguimbau*, ante, 105.)

APPEAL.

1. Where the plaintiff, in an action to recover the value of a watch, testifies on the trial to a state of facts tending to show that the watch was pledged to defendant for a loan of money, but in such a contradictory manner that the jury would have been authorized to find that the watch was sold to the defendant, as defendant's evidence tended to prove, and not pledged for a loan of money, as claimed by the plaintiff, and the jury find a verdict for the plaintiff, this court, on appeal, will not disturb the verdict. (*Hines* agt. *Strong*, ante, 97.)
2. Where a complaint contains two causes of action, and the referee finds from the evidence that there were no such causes of action, this court will not interfere with such finding. (*Graham* agt. *Selover*, ante., 107.)
3. Where, after the close of the testimony, and the cause summed up, the further consideration of the case is postponed, to enable the plaintiff to move at special term to amend his complaint, which motion is made and denied, it will not be held as error by this court, although the referee might have allowed the amendment if the mo-

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tion had been made before him, especially where the demand of the plaintiff is very stale, if not barred by the statute of limitations, and not, therefore, entitled to any favor from the court. (*Id.*)

4. The first subdivision of section 371 of the Code applies to *all cases of appeal* from a judgment of a justice's court where a *new trial* is to be had, and is not limited to cases depending upon questions of *law only*. (*Bixby* agt. *Warden*, *ante*, 239.)

5. Where under this section one good ground is stated in the notice of appeal, to wit: "That the judgment should have been more favorable to the defendant in this, to wit: it should not have been for a larger amount than ten dollars," it is sufficient to govern the *costs* on the appeal. (*Id.*)

6. Where the *terms of a parol contract* between the plaintiff and defendant are in dispute, and the evidence presents a question of fact for the justice to determine what those terms were, and he finds in accordance with the evidence and claim of the defendant, unless there has been some error committed in the admission or rejection of evidence, the judgment upon that finding cannot be disturbed. (*Kinney* agt. *Pudney*, *ante*, 258.)

7. An *appeal* from an order made at special term sustaining exceptions to a referee's report upon a question of fact reversing the referee's decision, cannot be taken directly to the general term. Judgment must first be entered and the appeal taken from that. (*Hemphill* agt. *Trull*, *ante*, 384.)

See COMMISSION.

Wallace agt. *Am. Linen Thread Company*, *ante*, 403.

8. If no printed copies of a case are served by appellant on respondent, as required by Rule 50, then, if no

motion be made by respondent to dismiss the appeal under Rule 50, when the cause is regularly reached in its order on the general term calendar, and the answer of the respondent is "ready," judgment of affirmance rendered at general term will be sustained. (*Brown* agt. *Niess*, *ante*, 465.)

9. The general term has jurisdiction of the appeal to affirm, reverse or modify the judgment appealed from when a case has been made, settled and filed. (*Id.*)

10. A party cannot plead his own laches as cause for the defeat of his antagonist who has adhered to the rule of court. (*Id.*)

See DEFAULT AND INQUEST.

Horn agt. *Brennan*, *ante*, 479.

See INSURANCE.

Bryce agt. *Lorillard Fire Ins. Co.*, *ante*, 498.

See COSTS.

Church agt. *Miller*, *ante*, 525.

11. An order denying a motion to dismiss the complaint on the ground that the summons does not contain the proper notice, does not, *it seems*, affect a substantial right, and is, therefore, not appealable to the general term. (Per MÜLLIN, P. J.) (*McCoun* agt. *N. Y. C. & Hudson R. R. Co.*, 7 *Lans.*, 75.)

12. An order of general term reversing an order of special term sustaining a demurrer, is not appealable to this court. (*Coit* agt. *Stewart*, 50 *N. Y. R.*, 17.)

13. The provisions of the Code regulating the formal proceedings in an action do not, simply because they are statutory regulations, necessarily become of the substance of the remedy or substantial in their character. (Per ALLEN, J.;

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- CHURCH, Ch. J., PECKHAM, J., concurring.) (*McCoun* agt. *N. Y. C. R. R. Co.*, 50 *N. Y. R.*, 146.)
14. An order denying motion to set aside a summons and complaint upon the ground that the notice inserted in the summons is not under the right subdivision of section 129 of the Code, where the complaint was served with the summons, does not affect a substantial right, and is not appealable to this court. (GROVER and FOLGER, JJ., dissenting.) (*Id.*)
15. Upon appeal from an order which may have been matter of discretion the appellant must show that it was made upon a ground that did not authorize the court to exercise any discretion; otherwise the appeal will be dismissed. (*Cushman* agt. *Brundrett*, 50 *N. Y. R.*, 296.)
16. The time to appeal in cases coming under the fourth subdivision of section 11 of the Code is not limited. (PECKHAM, J.) (*Id.*)
17. In an action upon a promissory note, tried by the court, where the defense is one not available as against a *bona fide* holder, in which position plaintiff claims to stand, after the receipt of all the evidence as to the *bona fides* of the transfer to plaintiff, and an announcement upon the part of the defendant that he has no more to offer upon that subject, if in the opinion of the court the testimony established the fact that plaintiff is a *bona fide* holder, it is not bound to receive the evidence offered to sustain the defense, and the decision cannot be reviewed by this court, although enough was shown to have required the submission of the question thus determined to a jury, had the case been tried by a jury. (*Brookman* agt. *Milbank*, 50 *N. Y. R.*, 378.)
18. Although a case contains no findings of fact or exceptions, if the judgment below is materially modified by the general term the party injuriously affected by the modification has the right, upon appeal to this court, to a review of the question as to the correctness of the modification. (*Hart* agt. *Wandle*, 50 *N. Y. R.*, 381.)
19. Where a general objection to proof offered is sustained, error will not lie if any true ground of objection exists. But if the proof is objectionable simply upon a ground which might be obviated, if specified, and such objection is not made, but is purposely suppressed, while others not tenable are stated, the former will be deemed to have been waived and cannot be urged to sustain the ruling upon appeal. (*Height* agt. *The People*, 50 *N. Y. R.*, 392.)
20. Where a judgment in an action tried by the court or a referee is reversed by the general term and new trial ordered upon questions of fact, the general term is not required to specify, in its order, the particular errors of fact to authorize a review in this court; it is sufficient if the order states generally that the reversal was based wholly, or in part, upon errors of fact. (*Hubbell* agt. *Meigs*, 50 *N. Y. R.*, 480.)
21. An appeal from an order does not authorize the review and reversal of any other order, however closely the two may be united. (*In re Com. of Central Park*, 50 *N. Y. R.*, 493.)
22. The provision of the act regulating the opening and laying out of streets, etc., in the city of New York, which declares that the reports of commissioners of estimate and assessment, appointed under it, when confirmed, shall be "final and conclusive" (§ 178, chap. 86, Laws of 1813; 2 *R. S.*, 408), was not repealed or affected by the general provisions of the Code prescribing the jurisdiction

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- of this court (Code, § 11), and an order confirming the report of commissioners of estimate and assessment appointed in proceedings by the commissioners of the Central Park under the act for the laying out and improvement of certain portions of the city of New York (chap. 697, Laws of 1867), which proceedings were governed by the act of 1813, is not appealable to this court. (*Id.*)
23. The right to a preliminary injunction or to an injunction *pendente lite* rests in all cases in the discretion of the court of original jurisdiction. An order, therefore, dissolving such an injunction does not affect a substantial right, and is not reviewable in this court. (*The People* agt. *Schoonmaker*, 50 *N. Y. R.*, 499.)
24. It does not follow from an allegation or averment of a litigant of the unconstitutionality of a particular law which enters into or even which may be the foundation of a litigation, that every order made in the progress of the action involves the constitutionality of such law within the meaning of subdivision 4 of section 11 of the Code, as enacted in 1865. (*Id.*)
25. *It seems* that to bring a case within that provision, the court in making the order complained of must have passed directly upon the constitutional question, and the intent of the legislature was to restrict such appeals to cases in which a law of the State is declared unconstitutional and a party thus deprived of some right given by the statute. (*Id.*)
26. An order denying a motion for a reargument, which motion is based upon the ground that a justice who sat as a member of the court upon the hearing of appeal from the judgment, is appealable to this court. (*Graham* agt. *Linden*, 50 *N. Y. R.*, 547.)
27. Where the record shows that other justices heard and decided the case at general term, this is not contradicted by proof that the justice before whom the case was tried, as presiding justice of the general term, called the case when reached upon the calendar, and made some inquiries of counsel as to the papers. (*Id.*)
28. A defendant has not an absolute legal right to have the facts upon which plaintiffs' claim for equitable relief depends, tried by a jury. The mode of trial, in such cases, is a matter of discretion with the court, and its decision, in respect thereto, is not reviewable in this court. (*Colman* agt. *Dixon*, 50 *N. Y. R.*, 572.)
29. A defendant has no absolute right to a preliminary order settling issues in an action for equitable relief to be tried by a jury. A refusal to grant such an order does not necessarily deprive the defendant of his right to such trial. If he has that right and the cause is brought to trial before the court without a jury the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury. If the court refuse so to do, defendant's remedy is by appeal from judgment. (*Id.*)
30. An appeal to this court from an interlocutory order is premature and improper. (*Id.*)
31. On appeal from a judgment dismissing complaint in an equity action, with costs, the general term modified the judgment by granting a portion of the relief prayed for, and affirmed it as thus modified. *Held*, that the general term in making their decision, necessarily held that the special term should not have dismissed the complaint, but should have granted that portion of the relief sought embraced in the modification, and that the form of the judgment was technically er

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- roneous; but that the error was one of form merely, except as the question of costs was concerned; and as costs were in the discretion of the court below, this court would not disturb the judgment upon that ground. (*Brooks* agt. *Curtis*, 50 *N. Y. R.*, 639.)
32. The rulings of this court, that error of law cannot be alleged upon appeal from an order and decision of an inferior court granting or refusing new trial, where the trial was by jury, and the facts as well as the law were before the court, having been made sufficiently public to render them obligatory upon the public and the profession, if appeals from orders granting new trials are persisted in, instead of dismissals thereof, judgments absolute will be rendered against the appellants, in pursuance of their stipulations upon appeal. (*ALLEN, J., PECKHAM and RAPPALLO, JJ.*, concurring.) (*Arnold* agt. *Robertson* [Mem.], 50 *N. Y. R.*, 683.)
33. An appeal does not lie to this court from an order granting or refusing a new trial on the ground of newly discovered evidence. (*Seoville* agt. *Landon* [Mem.], 50 *N. Y. R.*, 686.)
34. Upon argument of demurrer to defendant's answer the special term ordered that defendant have judgment on the demurrer, with leave to plaintiff to amend his complaint or reply, on payment of costs. Upon appeal, the general term affirmed the order, and directed that defendant have judgment on the demurrer, as provided in the order of special term. Upon this defendant entered what purported to be a judgment, adjudging that the order of special term be affirmed, and that defendant recover an amount named as costs. *Held*, that this was not a final judgment in the action, and was not appealable to this court. (*Barker* agt. *Cocks* [Mem.], 50 *N. Y. R.*, 689.)
35. A question as to the constitutionality of a law or as to the sufficiency of a pleading cannot be raised for the first time in the court of appeals. It cannot consider a matter or subject that has not been presented for adjudication to and determined by the subordinate court. (*Delaney* agt. *Brett*, 51 *N. Y. R.*, 78.)
36. A plaintiff upon appeal must stand by the theory of his case as presented by his complaint and upon the trial. Accordingly,—*Held*, that where plaintiff sued and claimed upon the trial as assignee, he could not upon appeal assert a claim other than that given by the assignment. (*Home Ins. Co.* agt. *W. T. Co.*, 51 *N. Y. R.*, 93.)
37. An appeal from a judgment of a general term does not bring up for review an order denying a motion for reargument, made subsequent to the judgment. (*Lewis* agt. *Greider*, 51 *N. Y. R.*, 231.)
38. An objection that a second complaint, made and served as supplemental, in pursuance of an order of special term, is not in aid of the original complaint, and therefore not supplemental, cannot be raised upon appeal from judgment. Defendants' remedy in such case is by appeal from the order; by answering such complaint the objection is waived. (*GRAY, C.*) (*Wetmore* agt. *Truston*, 51 *N. Y. R.*, 338.)
39. Resort cannot be had to the opinion of the general term to determine whether its reversal of a judgment entered upon the report of a referee was upon questions of fact. Unless this appears by the order or judgment of said court, it will be deemed to have been upon questions of law only. (*Sheldon* agt. *Sheldon*, 51 *N. Y. R.*, 354.)

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40. If the referee has found any material fact wholly without evidence or against the undisputed evidence, it is an error of law reviewable upon appeal. (*Id.*)
41. Where a general term order recites the fact of an appeal from the order of special term considered therein, it will be assumed that such an appeal was taken, although no notice of appeal is contained in the case. (*Struthers* agt. *Pearce*, 51 *N. Y. R.*, 365.)

APPEARANCE.

1. The *voluntary appearance*, by attorney, of several defendants in the action entitles the plaintiff to the same *costs* against them under section 307 of the Code, as if such defendants had been personally served with process. The voluntary appearance is equivalent to personal service of process. *Code*, § 137. (*The decision in the case of Macomber* agt. *Mayor &c.*, of *N. Y.*, 17 *Abb.*, 35, *disapproved.*) (*Schwinger* agt. *Hickox*, *ante*, 114.)
2. An appearance of a defendant by attorney, and upon the trial, in an action under the mechanics' lien law of 1854 for Westchester and other counties (chap. 402, laws of 1854), is a waiver of any defect in the service of the summons, and binds defendant the same as in any other action. (*Mors* agt. *Stanton*, 51 *N. Y. R.*, 649.)
3. A voluntary and general appearance in an action, not only gives jurisdiction of the parties, but cures any irregularity in the service of process. (*Carpentier* agt. *Minturn*, 65 *Barb.*, 293.)

ARBITRATION.

1. Where no charge of corruption or bad faith in the arbitrators is made mere errors of judgment are no

grounds for setting aside an award, and neither party will be allowed to prove for that purpose that the arbitrators decided wrong as to the law or the facts. (*Perkins* agt. *Giles*, 50 *N. Y. R.*, 228.)

2. An award that is sufficiently certain to be obligatory as a contract is valid. (*Id.*)
3. The rule that an agreement to arbitrate is not sufficient to oust a court of law or equity of jurisdiction, is a departure from the general principle that effect should be given to contracts when lawful in themselves according to their terms and the intent of the parties, and it will not be extended or applied to new cases not coming within the letter and spirit of the decisions already made. (*D. & H. C. Co.* agt. *Pa. Coal Co.*, 50 *N. Y. R.*, 250.)

ARREST.

1. A person duly arrested for fraud or trover cannot be discharged from arrest on the ground that he is an infant. (*The case of Brown* agt. *McCune*, 5 *Sand.*, 224, *has never been followed in this court.*) (*Schunemann* agt. *Paradise*, *ante*, 426.)

See EXECUTION.

Noe agt. *Christie*, *ante*, 496.

2. On a motion to vacate an order of arrest, the defendant may elect whether he will informally demur to the plaintiffs' case, set forth in the original affidavit as insufficient to warrant the arrest, thus presenting the naked legal question on undisputed averments of fact, or whether he will open the merits of the whole controversy by moving on counter-affidavits, raising issues of fact and proceed to an informal trial on affidavits. (*Evans* agt. *Holmes*, *ante*, 515.)
3. But he cannot, in legal effect, pursue both methods at the same time

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by selecting as the subject of denial and dispute such portions only of the plaintiffs' case as he may deem most easily disproved, and thus debar the plaintiffs from strengthening other portions by incontestable evidence, which on the original proof, perhaps, could hardly be sustained. (*Id.*)

4. Where the defendant, therefore, on a motion to discharge from arrest, upon all the affidavits and papers used on both sides, strenuously resisted the reception of an additional affidavit which the plaintiffs had procured, substantiating the charge of fraud on an averment made in their original affidavit, on the ground that the defendant had not assailed the truth of this particular averment in his moving affidavits, but rested his objection as to this point, solely on the insufficiency of the original affidavit. (*Id.*)
5. *Held*, that the additional affidavit of the plaintiffs must be received and read, which established the fact in question beyond dispute. (*Id.*)

ASSESSMENT AND TAXATION.

1. In an application to vacate an assessment under the act in relation to frauds in assessments for local improvements in the city of New York (chap. 338, Laws of 1858), the *onus* of establishing the alleged fraud or irregularity is upon the applicant, and he must make it appear that such fraud or irregularity exists before he is entitled to the relief sought. (*In re Bassford*, 50 *N. Y. R.*, 509.)
2. A single publication of a resolution authorizing a specific improvement in the city of New York two days before its adoption is a sufficient compliance with the provision of the city charter of 1857 (§ 7, chap. 446, Laws of 1857),

which prohibits the passage or adoption of such resolution until it has been published in all the newspapers employed by the corporation at least two days. (*Opinion of INGRAHAM, J.*, note. (*Id.*))

ATTACHMENT.

1. A general form of notice by the sheriff that he attaches "all the property, debts, &c., of the defendant in the possession or under the control" of the party served with the notice, when served with a copy of the warrant of attachment, does show the property levied on sufficiently, and is sufficient to constitute a valid levy under section 235 of the Code. (*O'Brien agt. Mechanics' and Traders' Fire Ins. Co.*, ante, 429.)
2. It is optional with the sheriff to limit his levy by specifications in his notice or not, as he pleases (*Clark agt. Goodrich*, 41 *N. Y.*, 200; 44 *How. Pr. R.*, 228, explained, qualified and distinguished). (*Id.*)
3. The four judges who concurred with HUNT, Ch. J., in the result in that case, did not concur in the opinion nor in the reasons given by the chief justice, as to the notice (*Kuhlman agt. Orser*, 5 *Duer*, 242; and *Wilson agt. Duncan*, 11 *Abb.*, 3). As to this point of notice and the two general term decisions in this case, 44 *How. Pr. R.*, overruled. (*Id.*)
4. *Greenleaf agt. Mumford* (19 *Abb.*, 469), *Drake agt. Goodrich* (54 *Barb.*, 78), approved in the reasons given, without reference to the facts of those cases. (*Id.*)
5. Under section 241 of the Code, it is the duty of the sheriff to retain possession of the property attached, notwithstanding the *ex parte* approval of the undertaking by the court or officer on granting the order for the discharge of the at-

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- attachment, until all objections to the sureties on plaintiff's part are either waived or the undertaking be reapproved on justification of the sureties; and any positive direction to the contrary which may be incorporated into the order of discharge, is erroneous. (*Moses agt. The Waterbury Button Company, ante*, 528.)
6. The verbal consent of the attorney for the plaintiff to the entry of the usual order for the discharge of the attachment, cannot, therefore, be construed into a waiver of the plaintiff's right to except to the sufficiency of the sureties or to their justification. (*Id.*)
7. It is not competent for a creditor to institute an action in order to make a proper case for issuing an attachment, or to place property in a situation to be subject to that process. The provisions of the Code, in reference to attachments (title 7, chap. 4, §§ 227 to 245), constitute a complete system for collecting debts in the cases and manner therein specified. The mode therein provided must be pursued; and unless property is so situated as to be attachable and convertible according to these provisions, it cannot be attached. (*Thurber agt. Blanck*, 50 *N. Y. R.*, 80.)
8. Debts and choses in action are to be regarded, under the attachment laws, as legal assets, whenever the attachment acts directly upon a legal title; but when they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they are to be treated as equitable assets only. (GROVER, PECKHAM and FOLGER, JJ., dissenting.) (*Id.*)
9. No authority is conferred to institute actions to reach mere equitable assets, or to bring in other parties for the purpose of attacking transfers of such property as fraudulent; that is the office of a creditor's bill, founded upon a judgment and execution. (*Id.*)
10. Accordingly held, that an attaching creditor could not maintain an independent action, in the nature of a creditor's bill, to set aside an alleged fraudulent assignment by the debtor of a bond and mortgage which the sheriff had attempted to attach by leaving with the obligor a certified copy of the attachment, with notice. (*Id.*)
11. Also held (GROVER, PECKHAM and FOLGER, JJ., dissenting), that the sheriff had no authority to bring an action against the assignee for that purpose, and to subject the bond and mortgage to the operation of the attachment. (*Id.*)
12. Where actions have been commenced in this state by a foreign corporation upon subscriptions to its capital stock, and where a warrant of attachment has been issued against such corporation, by virtue of which the sheriff has attached the debts sought to be recovered in such actions, the sheriff has the right, under section 237 of the Code, to assume the prosecution thereof, either in his own name or in that of the original plaintiff. They can also be prosecuted by the plaintiff in the attachment proceedings, upon giving the bond required by section 238. (*O'Brien agt. G. W. Co.*, 50 *N. Y. R.*, 128.)
13. Where several attachments have been issued and one of the attaching creditors assumes the prosecution of such actions, this does not conclude the others or operate as a bar to their claims. Until the debts are collected and appropriated to the payment of the attaching creditors in the order of their priority, they are in the custody of the law, and the sheriff is responsible to the party legally entitled thereto for whatever shall be collected in the pending actions.

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- He is a proper party, therefore, to bring an action against the adverse claimants of the fund to settle and establish their respective rights, or an action can be brought for that purpose by another of the attaching creditors. (*Id.*)
14. In case, however, it is determined that the attaching creditor who prosecuted the actions is not entitled to the avails of the collections, he or his attorney is entitled to the costs recovered therein. (*Id.*)
15. Whether upon the decease of the sheriff, in whose name an action has been instituted, to determine the rights of attaching creditors, his successor can be substituted as plaintiff, *quere*. The latter, as official successor and as trustee for all concerned, is a proper party. (*Id.*)
16. It seems an affidavit, on application for an attachment to a justice of the peace, showing grounds under the Revised Statutes and also under the act of 1831 (chap. 300, § 30, &c.), will authorize its issue under either. (*Reinmiller* agt. *Skidmore*, 7 *Lans.*, 161.)
17. And when a summons has been taken out against the defendant in the attachment, and the subsequent proceedings are in conformity with the act of 1831, that it may be presumed to have issued under that act, and although it contains a recital that it is issued upon proof that the defendant is about to depart, &c. (*Id.*)
18. If the justice approves the bond it will uphold his jurisdiction against a stranger to the proceedings, *e. g.*, a lessor of the property levied on, not party thereto, notwithstanding a mistake in the condition, *e. g.*, an omission to provide for the payment of all moneys received from the property levied on, over and above, &c. (*Id.*)
19. Reversal of the judgment in the action on which execution has issued against the attached property does not, it seems, invalidate the levy or sale, or make either the party or officer a trespasser. (*Id.*)
20. It merely annuls the title acquired through the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come. (*Id.*)
21. One holding a chattel for a time, *e. g.*, a year, paying monthly sums for a particular use and no other, and prohibited from selling or loaning, is not a lessee, but mere licensee, having no interest liable to an attachment against his property. (*Id.*)
22. Proceedings under attachment (Code, § 227) are ineffectual to reach a debt, due on account to the defendant in the action, where the sheriff fails to give notice of the levy to the debtor. (*Clark* agt. *Warren*, 7 *Lans.*, 180.)
23. A chose in action is incapable of seizure by the sheriff. (*Id.*)
24. It seems a chose in action is excepted from sale by subdivision 2, § 237, Code. (*Id.*)
25. The fraudulent assignment of a bond and mortgage by a debtor does not prevent his creditor from acquiring a lien thereon by attachment; and where such lien has been acquired by the service of the attachment, with the proper notice upon the obligor and mortgagor, the attachment creditor, after perfecting judgment and issuing execution, may maintain an equitable action in his own name to enforce the lien, by setting aside the fraudulent transfer. (*M. & T. Bank* agt. *Dakin*, 51 *N. Y. R.*, 519.)
26. There is an original jurisdiction in the court of equity, independent of the statute in relation to at-

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tachments, to take cognizance of actions of this character. (*Id.*)

ATTORNEY.

1. A transfer of property made by a debtor for the purpose of withholding it from the satisfaction of the lawful demands of his creditors is a misdemeanor under the statutes of New York, and the person who receives as well as the one who transfers the title are both guilty. (*Goodenough* agt. *Spencer*, ante, 347.)
2. No attorney or counsel has the right, in the discharge of professional duties, to induce his client, by his advice, to the violation of the laws of the state, and when he does so he is implicated in his client's guilt, and the court will not allow him to be profited by his unlawful conduct. (*Id.*)
3. The relation existing between attorney, counsel and client considered. (*Id.*)
4. It will, however, maintain the validity of a transfer made to an innocent third party, provided the title is perfect; but if a condition set forth in the bill of sale suggests to the vendee a doubt as to the perfection of the title, then he must bear the consequences of his neglect in the examination of the title. (*Id.*)
5. In agreements between attorneys and clients, even though made under section 303 of the Code, the court will observe the rule of giving the most favorable construction thereof in the interest of clients. (*Burling* agt. *King*, ante, 452.)
6. Held, that there should be made by the courts, in defense of the honor and integrity of the legal profession, a discrimination between contracts properly stipulating a measure of compensation for professional services, and those in which attorneys secure to themselves an interest virtually as owners, in the subject-matter of litigation. (*Id.*)
7. It has long been settled, that professional communications between a party and his professional adviser, although they do not relate to any litigation, either commenced or anticipated, are privileged where the *solicitor* is the party interrogated. This privilege now extends equally to both parties. (*Carnes* agt. *Platt*, ante, 520.)
8. Since the Code, the fee bill is not the measure of an attorney's services. He must prove them, as before the Code, when they were not rendered in a suit. (*Garfield* agt. *Kirk*, 65 *Barb.*, 464.)
9. To entitle an attorney to recover for professional services rendered to his client, he is not required to swear to each notice drawn and served, and how much it was worth. It is enough for him to prove, in general terms, the proceedings in a cause, the time occupied in the performance of any part of the services by which their value was enhanced, and the value of the whole, or in detail, as he may elect. (*Id.*)
10. In such an action the value of the plaintiff's services may be proved by the opinions of attorneys, founded partly on their personal knowledge of the services, and partly upon the testimony of the plaintiff and others personally acquainted with them. (*Id.*)
11. In an action by an attorney against his client, to recover for his services, the value of the property involved in a litigation is a legitimate subject of proof. (*Id.*)
12. An attorney has a lien upon a judgment recovered by him for any sum agreed upon between him

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and his client as a compensation for his services, as well as for the costs in the judgment, and, to the amount of such lien, is to be deemed an equitable assignee. When the recovery is solely for costs, the judgment itself is legal notice of the lien, and this lien cannot be discharged by payment to any one but the attorney. (*Marshall* agt. *Meech*, 51 N. Y. R., 140.)

13. But when the judgment is for damages and costs it is not notice of the lien, even for the taxed costs, and such lien can be protected only by notice to the judgment debtor. (*EARL*, C., dissenting.) (*Id.*)

14. An attorney who brings an action in the name of another, in which he is beneficially interested by virtue of an agreement by which he is to have a portion of the recovery as compensation for his services, is liable, the same as the plaintiff, for defendant's costs (2 R. S., 619, § 44). His liability has not been affected by the provision of the Code (§ 303) legalizing such agreements. (*Voorhees* agt. *McCartney*, 51 N. Y. R., 387.)

AUDITING CLAIMS.

See MANDAMUS.

People ex rel. Hawley agt. *Earle*, ante, 267.

Matter of Brown agt. *Green*, ante, 302.

People ex rel. Duffin agt. *Earle*, ante, 308.

People ex rel. Miller agt. *Green*, ante, 367.

AWARD.

1. Where no charge of corruption or bad faith in the arbitrators is made, mere errors of judgment are no grounds for setting aside an award, and neither party will be allowed

to prove for that purpose that the arbitrators decided wrong as to the law or the facts. (*Perkins* agt. *Giles*, 50 N. Y. R., 228.)

2. An award that is sufficiently certain to be obligatory as a contract is valid. (*Id.*)

B.

BANK CHECK.

1. Forgery in bank check, mutual mistake, upon whom loss should fall—viewed in a moral light, each party was guiltless; in the law the negligence of the one is no greater than that of the other, and for this reason it is inequitable for the defendant to detain the money paid by the plaintiffs under a mistake common to each. (*Nat. Bk Commerce* agt. *Nat. Mech.'s Banking Association*, ante, 374.)

BANKRUPTCY.

See JURISDICTION.

Gilbert agt. *Crawford*, ante, 222.

BILLS, NOTES, CHECKS.

1. The next day after presentment and demand of payment of a note payable at a place in the city of New York, the clerk of the notary examined the city directory to find the address of an indorser, whose address was not upon the note. Not finding it, he inquired of the maker, who gave him a wrong address, to which he mailed notice. *Held*, that this was due diligence and sufficient to charge the indorser. (*Gawtry* agt. *Doane*, 51 N. Y. R., 84.)

2. The degree of diligence required to charge an indorser, under the provisions of the act of 1857, in relation to commercial paper (sec-

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tion 3, chap. 416, Laws of 1857), by service of notice of protest by mail, where the reputed residence of the indorser is at the same place where the note is payable, is no greater than that required by the common law in a case where the place of payment differs from the place of residence. (*Requa* agt. *Collins*, 51 N. Y. R., 144.)

3. Defendant indorsed a promissory note made payable at a bank in the city of Rochester. At the time of and for ten years prior to the indorsement, she resided in that city, and six months before the note fell due, she removed to the city of New York. Plaintiff's agent made various inquiries shortly before the maturity of the note, among others, of a relative of defendant, and was informed she still resided in Rochester. When the note was left at the bank for collection, the teller was informed that all the parties lived in Rochester, and he so advised the notary who protested the note. No inquiry was made in Rochester upon the day the note matured. Notice of protest was mailed to defendant, addressed to her at Rochester. *Held*, that within the meaning of the act of 1857, Rochester was the city where, "from the best information obtained by diligent inquiry," defendant was reputed to reside; that the service was sufficient and defendant properly charged. (*Id.*)

BROKER.

1. Where a *real estate broker* on receiving a piece of real estate from the owner for sale, being apprehensive that an adjoining owner may purchase it, proposes to the owner that if such adjoining owner does purchase he (the owner) shall pay the broker his *commissions*, as such prospective purchaser, being unfriendly to the broker, would not purchase from or through him, to which proposition the owner assents, and the property is subsequently sold to such adjoining owner, the broker is entitled to his commissions from the owner, although it is claimed by him that the property was sold by another firm of real estate brokers and that the plaintiff had nothing to do with the sale of it. (*Emberson* agt. *Dean*, *ante*, 236.)
2. The verdict of the jury, upon conflicting and contradictory testimony in such cases, in favor of the plaintiff, held conclusive. (*Id.*)
3. To entitle a real estate broker to compensation, it is sufficient that a sale is effected through his agency as its procuring cause; and if his communications with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale. (*Lloyd* agt. *Matthews*, 51 N. Y. R., 124.)
4. It is not necessary that the purchaser be made known to the owner as the broker's customer if he is so in fact. The owner is entitled to know that the broker has been instrumental in sending the purchaser; but when advised by the latter that he has received information of the purpose to sell and the price, it is the owners duty to inquire whence the information was derived. (*Id.*)
5. Where the owner has placed his property in the hands of two or more brokers to sell, notice to one of a change of purpose does not affect another, nor is the latter chargeable with notice because of acts of the owner in improving the property inconsistent with a design to sell, and his agency is not revoked thereby. (*Id.*)

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C.

CASES AFFIRMED, REVERSED, &c.

Allen agt. *White* (57 Barb., 504), re-affirmed. (*Hall* agt. *Siegel*, 7 Lans., 106.)

Chase agt. *City of Lowell* (7 Gray, 35), approved and followed. (*Argus Co.* agt. *Mayor of Albany*, 7 Lans., 264.)

Granite Bank agt. *Ayers* (16 Pick., 392), approved and followed. (*Bryan* agt. *Baldwin*, 7 Lans., 174.)

Mack agt. *Putchin* (42 N. Y., 171), explained. (*Gallup* agt. *Albany Railway*, 7 Lans., 471.)

Morris agt. *Mowatt* (2 Paige, 586), held applicable and followed. (*Raynor* agt. *Selmes*, 7 Lans., 440.)

White agt. *McNett* (33 N. Y., 371), applied. (*Prendergast* agt. *Borst*, 7 Lans., 489.)

The decisions in *Honegsberger* agt. *The Second Avenue Railroad Company* (1 Keyes, 570), and *Warner* agt. *The N. Y. Central Railroad Co.* (44 N. Y. 465), commented on, and disapproved. (*Costello* agt. *The Syracuse &c., Railroad Co.*, 65 Barb. 92.)

Contributory negligence is matter of defense, and not to be affirmatively disproved in order to entitle the injured party to recover for a personal injury. The decision to the contrary in *Warner* agt. *The N. Y. Central R. R. Co.* (44 N. Y. 465), was *obiter*, and is not binding as authority. (*Robinson* agt. *The N. Y. Central &c., R. R. Co.*, 65 Barb., 146.)

The case of *The Corn Exchange Ins. Co.* agt. *Babcock*, (42 N. Y. 613), distinguished from this. (*Bogert* agt. *Gulick*, 65 Barb., 322.)

The case of *Ryan* agt. *The N. Y. Central Railroad Company* (35 N.

Y. 210), and other cases to the same effect, distinguished from the present, and declared to have been cases of *negligence*, or causes arising upon *contract*, where the question was, what was the proper rule of damages. They do not apply to cases of *willful wrongs*. (*Munger* agt. *Baker*, 65 Barb., 539.)

Springer agt. *Dwyer* (58 Barb., 189), reversed. (*Springer* agt. *Dwyer*, 50 N. Y. R., 19.)

Heinemann et al agt. *Heard et al.* (58 Barb., 524), reversed. (*Heinemann et al.* agt. *Heard et al.*, 50 N. Y. R., 27.)

First National Bank of Whitehall agt. *Lamb et al.* (57 Barb., 429), reversed. (*First National Bank of Whitehall* agt. *Lamb et al.*, 50 N. Y. R. 95.)

Miller agt. *White et al.* (57 Barb., 504; 59 Barb., 434), reversed. (*Miller* agt. *White et al.*, 50 N. Y. R., 137.)

Goodwin et al. agt. *Balt. & Ohio R. Co.* (58 Barb., 195), reversed. (*Goodwin et al.* agt. *Balt. & Ohio R. Co.*, 50 N. Y. R., 154.)

Case of the Protector (12 Wall., 700), explained. (*McStea* agt. *Matthews*, 50 N. Y. R., 170.)

Smyth agt. *Smyth* (2 Addams, 254; 2 Eng. Eccl. R., 293), explained. (*Brinkley* agt. *Brinkley*, 50 N. Y. R., 189.)

People agt. *Kerr* (27 N. Y. 188), criticised. (*Kellinger* agt. *Forty-second Street, etc.*, R. R. Co., 50 N. Y. R., 209.)

Price agt. *Oswego & Syracuse R. R. Co.* (58 Barb., 599), reversed. (*Price* agt. *Oswego & Syracuse R. R. Co.*, 50 N. Y. R., 213.)

Hurst agt. *Litchfield* (39 N. Y., 377), criticised. (*President, etc.*, D. &

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- H. Canal Co. agt. Penn. Coal Co.*, 50 N. Y. R., 265.)
- Scott agt. Avery* (5 H. of L. C., 811), explained. (*President, etc., D. & H. Canal Co. agt. Penn. Coal Co.*, 50 N. Y. R., 267.)
- In re Will of John Kellum* (6 Lans., 1), reversed. (*In re Will of John Kellum*, 50 N. Y. R., 298.)
- White agt. Carroll* (42 N. Y., 161), explained. (*Marsh agt. Ellsworth et al.*, 50 N. Y. R., 313.)
- Verona Cent. Cheese Co. agt. Murtaugh* (4 Lans., 17), reversed. (*Verona Cent. Cheese Co. agt. Murtaugh*, 50 N. Y. R., 314.)
- Miner agt. Beekman et al.* (42 How. Pr., 33), reversed. (*Miner agt. Beekman et al.*, 50 N. Y. R., 337.)
- Adams agt. Davidson* (6 Seld., 313), explained. (*Bullis et al. agt. Montgomery et al.*, 50 N. Y. R., 359.)
- Howard Ins. Co. agt. Scribner* (5 Hill, 298), overruled. (*Ogden agt. East River Ins. Co.*, 50 N. Y. R., 390.)
- Germond agt. Jones* (2 Hill, 569), explained. (*Moncrief agt. Ross et al.*, 50 N. Y. R., 436.)
- Campbell agt. Johnston* (1 Sand Ch., 148), explained. (*Moncrief agt. Ross et al.*, 50 N. Y. R., 436.)
- People ex rel. Furman et al. agt. Clute* (42 How. Pr., 157), reversed. (*People ex rel. Furman et al. agt. Clute*, 50 N. Y. R., 451.)
- McCabe agt. Swap* (14 Allen, 188), explained. (*Graham agt. Linden*, 50 N. Y. R., 552.)
- People agt. Hills* (35 N. Y., 449), explained and distinguished. (*People ex rel. City of R. et al. agt. Briggs et al.*, 50 N. Y. R., 561.)
- Lane agt. Salter et al.* (4 Robt., 239), reversed. (*Lane agt. Salter et al.*, 51 N. Y. R., 1.)
- Bennett agt. Judson* (21 N. Y., 238), criticised and questioned. (*Wake-man agt. Dalley, impleaded, &c.*, 51 N. Y. R., 33.)
- Matthews agt. Coe* (49 N. Y., 57), distinguished and limited. (*Lobdell agt. Stowell*, 51 N. Y. R., 77.)
- Brookman agt. Hamill* (43 N. Y., 554), distinguished. (*Delaney agt. Brett et al.*, 51 N. Y. R., 82.)
- The Propeller Mohawk* (8 Wall., 153), distinguished. (*Home Ins. Co. agt. Wes. Tr. Co.*, 51 N. Y. R., 96.)
- Ross agt. Mather* (47 Barb., 582), reversed. (*Ross agt. Mather*, 51 N. Y. R., 108.)
- Williamson agt. Allison* (2 East, 446), disapproved. (*Ross agt. Mather*, 51 N. Y. R., 112.)
- Belger agt. Dinsmore* (51 Barb., 69; 34 How. Pr. R., 421), reversed. (*Belger agt. Dinsmore*, 51 N. Y. R., 166.)
- Blossom agt. Dodd* (43 N. Y., 264), distinguished. (*Belger agt. Dinsmore*, 51 N. Y. R., 171.)
- Kennedy agt. Thorp et al.* (2 Daly, 258), reversed. (*Kennedy agt. Thorp et al.*, 51 N. Y. R., 174.)
- Prest., &c., Del. and Hud. Canal Co. agt. Clark* (Sup. Ct. U. S., not yet reported), explained. (*Newman et al. agt. Alvord et al.*, 51 N. Y. R., 196.)
- Chandelor agt. Lopus* (Oro. Jac., 4), explained. (*Hawkins agt. Pemberton et al.*, 51 N. Y. R., 202.)
- Seizas agt. Wood* (2 Caines, 48), explained. (*Hawkins agt. Pemberton et al.*, 51 N. Y. R., 203.)

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Sweett agt. *Colgate* (20 *J. R.*, 196), explained. (*Hawkins* agt. *Pemberton et al.*, 51 *N. Y. R.*, 204.)

Alexandre et al. agt. *Sun Mut. Ins. Co.* (49 *Barb.*, 475), reversed. (*Alexandre et al.* agt. *Sun Mut. Ins. Co.*, 51 *N. Y. R.*, 253.)

The Gt. Indian Peninsula R. Co. agt. *Saunders* (1 *B. & S.*, 101; *Eng. C. L. R.*, 41, affirmed; 2 *B. & S.*, 110 *id.*, 266), distinguished. (*Alexandre et al.* agt. *Sun Mut. Ins. Co.*, 51 *N. Y. R.*, 266.)

Kimberly agt. *Patchin* (19 *N. Y.*, 337), distinguished. (*Foot et al.* agt. *Marsh et al.*, 51 *N. Y. R.*, 292.)

Whitaker agt. *Eighth Ave. R. R. Co.* (5 *Robt.*, 650), reversed. (*Whitaker* agt. *Eighth Ave. R. R. Co.*, 51 *N. Y. R.*, 295.)

Jones agt. *Shears* (4 *Adol. & El.*, 832), questioned. (*Schuyler* agt. *Smith et al.*, 51 *N. Y. R.*, 317.)

Ives agt. *Müller* (19 *Barb.*, 197), questioned. (*Waddell* agt. *Darling*, 51 *N. Y. R.*, 332.)

Coster agt. *Lorillard* (14 *Wend.*, 265), explained. (*Wetmore et al.* agt. *Truslow et al.*, 51 *N. Y. R.*, 343.)

Craig agt. *Hone* (2 *Edw.*, 554), explained. (*Wetmore et al.* agt. *Truslow et al.*, 51 *N. Y. R.*, 344.)

Dean agt. *Peel* (5 *East*, 45), criticised and explained. (*Gray* agt. *Durland*, 51 *N. Y. R.*, 427.)

Losee agt. *Buchanan et al.* (61 *Barb.*, 86), reversed. (*Losee* agt. *Buchanan et al.*, 51 *N. Y. R.*, 476.)

Hay agt. *The Cohoes Co.* (2 *N. Y.*, 159), distinguished. (*Losee* agt. *Buchanan et al.*, 51 *N. Y. R.*, 479.)

Hedges agt. *Tagg* (*L. R.*, 7 *Exch.*, 283; 2 *Moak*, 679), disapproved. (*Gray* agt. *Durland*, 51 *N. Y. R.*, 482.)

Fletcher agt. *Ryland* (1 *Exch.*, 265 [*L. R.*], affirmed, 3 *H. L.* [*L. R.*], 330), questioned. (*Losee* agt. *Buchanan*, 51 *N. Y. R.*, 486.)

Thomas agt. *Winchester* (2 *Seld.*, 397), distinguished. (*Losee* agt. *Glute et al.*, 51 *N. Y. R.*, 497.)

Haven agt. *Erie Railway Co.* (41 *N. Y.*, 296), explained. (*Eaton* agt. *Erie Railway Co.*, 51 *N. Y. R.*, 548.)

Twinam agt. *Swart* (4 *Lans.*, 263), limited. (*Allen* agt. *Fbx*, 51 *N. Y. R.*, 566.)

CERTIORARI.

1. When a case is made for issuing a writ of *certiorari*, it will be directed to all persons whose return is necessary to enable the court to determine the regularity or validity of the proceedings of the officer or tribunal sought to be reviewed. (*The People ex rel. Davis* agt. *Hill*, 65 *Barb.*, 170.)
2. To require that a writ should issue to each of the officers or bodies whose action is sought to be reviewed, is wholly unnecessary; it seems. It would be sacrificing substance to form. (*Id.*)
3. The court, in reviewing proceedings, on *certiorari*, is governed by the return of the officers or body to whom the writ is directed. It will not take into consideration papers annexed to the return. (*Id.*)
4. If the return to a writ of *certiorari*, is not sufficiently full in relation to the matters which the relator desires to have reviewed, he should apply for a further and more specific return. If he omits to do so, the return will be held sufficient if it sets forth the determination made, and the facts upon which it was founded. (*Id.*)

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5. A petitioner for bonding a town for railroad purposes may bring a *certiorari* to review proceedings of the county judge thereon, which have been illegally conducted. (*People ex rel. Youmans* agt. *Wagner*, 7 *Lans.*, 467.)
6. A *certiorari* brought in the name of A. B., "supervisor of the town of, &c.," may be regarded, if the supervisor has no authority, as the individual proceeding of A. B. (*Id.*)
7. And so it may be regarded as the proceeding of the town, if the individual is not entitled to institute it. (*Id.*)
8. The town may bring the proceeding to review the action of the county judge. (*Id.*)
9. Petitioners may withdraw their signatures at any time before the final submission of the matter to the judge. (*Id.*)
10. On proceeding upon the petition, the contestants offered to have certain petitioners appear and withdraw their consents. *Held*, that it was error to reject this offer upon a general objection, and that the objection that the petitioners were not actually produced could not be first made upon review. (*Id.*)
11. It is not essential that the parties opposing the proceedings before the county judge should be named in his return to a writ of *certiorari*. (*Id.*)
12. It is the office of a common-law *certiorari* to review the determinations of a board of supervisors, and this remedy is proper in case such a board rejects, as not just or legal, a claim which the legislature has declared by statute to be just and legal, and has directed the board to audit and allow. Although the court cannot by *certiorari* compel a performance of

this duty, it can reverse the erroneous decision, leaving the party, in case of further refusal to perform its duty, to such further remedy by mandamus or otherwise as the law gives him. (*People ex rel. agt. Board of Supervisors of Madison County*, 51 *N. Y. R.*, 442.)

CHATTEL MORTGAGE.

1. When default is made in the payment of the debt which a chattel mortgage is given to secure, the title to the mortgaged property becomes, *eo instanti*, absolute in the mortgagee. (*Halstead* agt. *Swartz*, ante, 289.)
2. The only right that remains to the mortgagor, after such default, is that of redemption; and this right may be barred by a sale of the property at public auction or private sale, without notice. (*Id.*)
3. If the debt is payable in *installments* and default is made in the payment of one installment only, the title of the mortgagee is as perfect as if default was made in payment of the whole debt. (*Id.*)
4. To entitle the mortgagor to *redeem* under such a mortgage he must pay or tender the whole debt. The whole title vests on default, and the whole title must be divested by the redemption; and that can only be done on payment of the whole debt. (*Id.*)
5. In an action of *trover* the plaintiff is entitled to recover the value of the property, as of the time of the sale made by the mortgagee, and for the loss of the use prior thereto; but he is not entitled to the value of the use subsequently. (*Id.*)
6. Where a *chattel mortgage* conveys the whole stock in trade, the whole concern forming the grocery and liquor store of the mortgagor, with

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the increase and decrease thereof, and providing for the continued possession of the mortgagor, it is void on its face. (*Mittnacht* agt. *Kelly*, ante, 457.)

7. Although a horse, wagon and harness mortgaged, did not constitute part of the stock in trade which was the subject of "increase and decrease," yet as to the stock in trade, the mortgage being fraudulent as against creditors, that fraud affected the whole mortgage, rendering it wholly void. (*Id.*)

CLAIM AND DELIVERY.

1. A defendant is not estopped by the execution and delivery of an undertaking to the sheriff from showing the true amount and value of the goods taken by the sheriff, and redelivered to him. (*Talcott* agt. *Belding*, ante, 419.)
2. Nor can the plaintiff's affidavit, nor the recitals in the undertaking be used as showing the true amount and value of the goods, where the allegations in these papers are too indefinite and uncertain to justify a verdict for any precise sum or quantity of articles, &c. (*Id.*)
3. Executions in these cases must clearly describe the property of which possession is to be delivered. (*Id.*)
4. An undertaking given in these proceedings is not required to be sealed and is not a deed, nor does it form any part of the record in the action; it is collateral. As an estoppel in pais it is inoperative. (*Id.*)
5. Where the defendant is lawfully in possession of goods under an assignment made to him for the benefit of creditors, a demand, by the plaintiff, of the property before suit brought is necessary. (*Id.*)

6. In an action to recover the possession of personal property, where the property has a usable value, the value of its use, during the time of the detention, is a proper item of damages. (*Allen* agt. *Fox*, 51 N. Y. R., 562.)

7. A requisition upon the sheriff in an action to recover the possession of personal property, only protects him in taking the property specified from the possession of the defendant named. Where, however, the actual possession remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection. (*Bullis* agt. *Montgomery*, 50 N. Y. R., 352.)

COMMISSION.

1. An order denying a motion for commission to take testimony of a foreign witness is appealable, because it affects a substantial right. (*Wallace* agt. *Am. Linen Thread Co.*, ante, 403.)
2. An order granting a commission is not appealable, because it cannot affect prejudicially a substantial right. (*Id.*)
3. The right of a party to an action to have the evidence of witnesses taken upon commission, and the power of the court to award a commission, depends solely upon the statute. (*McColl* agt. *S. M. Ins. Co.*, 50 N. Y. R., 332.)
4. Under the statute (2 R. S., 394, §§ 11, 12, 23), a commission is not authorized unless an issue of fact is joined, and is depending when the application therefor is made, and the right to the trial of the issue appears upon the record. (*Id.*)
5. Accordingly held, that an order awarding a commission made after the judgment and appeal, and while the appeal was pending un-

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determined, was erroneous. (GROVER, J., dissenting.) (*Id.*)

COMPLAINT.

1. A complaint in the first count, alleged that on, &c., the defendant, for value received, assigned to the plaintiff a certain judgment; that subsequently, on, &c., the defendant discharged said judgment of record; that some of the defendants therein were owners of certain personal property, which, but for such discharge would have been liable to execution and sale; that such defendants are now insolvent; and that the plaintiff was injured by such discharge. The second count in the complaint was an ordinary count for money had and received. *Held*, on demurrer, 1. That if the pleader was right in supposing that the law implied a promise by the defendant not to satisfy the judgment after it was assigned to the plaintiff, he was bound to allege that the defendant undertook and promised not to satisfy it, in order to make it a count on contract. 2. That for the want of such an averment, there was a misjoinder of causes of action; the one being for a tort, and the other on contract. (*Booth* agt. *The Farmers and Mechanics' National Bank of Rochester*, 65 *Barb.*, 457.)
2. The first count in a complaint contained a cause of action to recover damages for fraud and deceit in the sale, by the defendant, to W., M. and D., of an interest which the defendant represented that he owned in a lease of oil lands. It alleged the falsity of the representations; the procurement by means of them of the price agreed to be paid for the interest; that by reason of the fraud, the plaintiff sustained damages; and that, by the agreement, the defendant was to convey the interest in the lease to D., for the benefit of the purchasers; and that the conveyance was made accordingly. It was further alleged that W. and M. had assigned to the plaintiff all their rights, legal and equitable, in and to the money paid to the defendant for the interest in the lease, and to all claims they, and each of them, had against the defendant, growing out of the purchase of such interest; and that D. had released the defendant from all claims he had against the defendant, growing out of the matters aforesaid. *Held*, on demurrer, 1. That the said first count contained a cause of action for the deceit; and that it was assignable. 2. That inasmuch as only two of the three purchasers of the interest in the lease assigned to the plaintiff, and as the purchase was by the three jointly, there was a defect of parties; but the same was covered by the allegation in the complaint that D. had released the defendant from liability to him. (*Woodbury* agt. *Deloss*, 65 *Barb.*, 501.)
3. The same complaint contained a second cause of action, on what was called an implied covenant, that the defendant had the interest in the said lease that he pretended to sell to W., M. and D. *Held* that the second count contained no cause of action. (*Id.*)
4. In the third and fourth counts it was alleged that the defendant was indebted to the plaintiff for money had and received by the defendant of W. and M. "on &c., as above stated;" *held* that this averment incorporated the allegations of the first count into the third and fourth counts, and rendered the latter, counts for money had and received by means of false and fraudulent representations; and that as the liability grew out of the same transaction, as was alleged, with that contained in the first count, they were properly united, and contained causes of action. (*Id.*)

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CONSIDERATION.

See TITLE.

Mulkin agt. *Bates*, ante, 405.

CONTRACT.

1. Where a written contract is entered into by the contractor with the mayor, &c., for regulating and grading a street, which contains the specification of the work to be done and the price to be paid, not including *slopes* in excavation of *rock* outside of the perpendicular line of the street, but provides "that in case any other work is required to be done in order to carry out the provisions of this agreement, which is not called for in the specification, that he will go on and do the same without any claim for extra compensation therefor," the contractor cannot recover extra compensation for such slopes in excavation of rock: (*Voorhis* agt. *Mayor*, &c., *N. Y.*, ante, 116.)

2. 1st. Because the contract does not call for this work; and 2d. If the contractor finds it easier or necessary to do it, in fulfilling what the contract does call for, then it falls within the above provision for other work to be done without extra compensation. (*Id.*)

3. It is competent for the parties to such a contract to make it an exception to the usual contracts of this kind; and whenever this is done, the terms of the contract must prevail. Custom or usage cannot be set up against it, there being nothing ambiguous in it, nor any intention respecting it which custom or usage should supply. (*Id.*)

4. In an action for alleged breach of contract in defendants refusing to receive and pay for certain goods which the plaintiffs contracted to sell to them, subsequently to arrive

in a designated vessel, in order to recover it is necessary for the plaintiffs to show the delivery or a readiness and offer to deliver the whole quantity of goods. (*Newbery* agt. *Furnival*, ante, 139.)

5. Where a *part* of the goods arrive, if the defendants, knowing this fact, accept it, this probably will be a waiver, or if they make no objections to a delivery of the whole at that time, but affirmatively refuse to receive them on some other ground, this probably would constitute a waiver of delivery of the whole. (*Id.*)

See VENDOR AND PURCHASER.

Page agt. *McDonnell*, ante, 52, 299.

See PROMISSORY NOTE.

Kelly agt. *Ferguson*, ante, 411.

6. Where the agreement for the compromise or composition of the joint liability of the defendants in an action, pending in this state, is made in Ohio, the agreement is to be construed by the laws of New York and not by the laws of Ohio. (*Saxton* agt. *Dodge*, ante, 467.)

COSTS.

1. In an action in *equity* for an accounting between cotenants, where the complaint asks for relief, and the referee on the trial finds and orders judgment for the plaintiffs and certain of the defendants for the respective sums due each, but without deciding anything respecting the *costs* of the action, the plaintiffs on entering judgment are not entitled to enter it *with costs*. (*Phelps* agt. *Wood*, ante, 1.)

2. Costs in such actions are in the discretion of the referee, and where he has not awarded costs the plaintiffs are not authorized to tax and enter them in the judgment. (*Id.*)

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3. Although section 416 of the Code requires parties to *file pleadings without notice*, yet where notice has been given as an act of courtesy, and the pleadings have not been filed, and an affidavit is necessary in proof of the omission and to obtain an order to compel the filing, ten dollars costs will be allowed the moving party for his trouble. (*Langbein* agt. *Goss*, ante, 50.)
 4. In an action at law, where an *equitable defense* is interposed, and judgment is ordered for the defendant on such defense, *without costs* to either party, upon which order the defendant enters judgment with taxed costs, a motion by the plaintiffs to strike out such costs will be denied. (*Lanz* agt. *Trout*, ante, 94.)
 5. It being an action at law, the court or referee has no discretion as to which party shall have costs; the Code governs the costs and the right to costs. (*Id.*)
 6. The *voluntary appearance*, by attorney, of several defendants in the action entitles the plaintiff to the same *costs* against them under section 307 of the Code, as if such defendants had been personally served with process. The voluntary appearance is equivalent to personal service of process, Code, § 137. (*The decision in the case of Macomber* agt. *Mayor, &c., of N. Y.*, 17 *Abb.*, 35, *disapproved.*) (*Schwinger* agt. *Hickok*, ante, 114.)
 7. Where the plaintiff in an action of trover before the justice recovered against the defendant the sum of \$100, and on the defendant's appeal for and a new trial had in the county court the plaintiff recovered \$83.88, *held*, that the defendant was entitled to the costs of appeal to the county court and the costs of appeal to this court. (*Buxby* agt. *Warden*, ante, 239.)
 8. Under the provisions of section 385 of the Code where a verdict obtained is not more favorable than an offer previously made by defendant, the costs accruing after the offer are to be taxed in favor of the defendant, the plaintiff's costs being confined to the time prior to the offer. (*Magnin* agt. *Dinsmore*, ante, 297.)
 9. The successful party is not entitled to a double *bill of costs* on two appeals to the general term in the same case. (*Bullard* agt. *Pearsall*, ante, 383.)
- See SHERIFF.
Crofut agt. *Brandt*, ante, 481.
10. On an appeal by the plaintiff from a judgment of a justice's court, rendered for defendant for fifty dollars, upon a counter-claim, to the county court, where a new trial was had before a jury, who found a verdict of no cause of action against the plaintiff. (*Church* agt. *Miller*, ante, 525.)
 11. *Held*, that the defendant's rights not being affected by the question of offer (as none was necessary), he did not cease to be the prevailing party. He did not, it is true, establish his own claim, but he prevailed to destroy that of the plaintiff, and, therefore, his judgment before the justice was not reversed, and he was entitled to the costs of the action. (*Id.*)
 12. In a difficult and extraordinary case, after issue and before trial, it having been twice on the calendar and prepared by defendant for trial, and order was entered, on motion of plaintiff, discontinuing, "on payment of defendant's costs to be taxed, and of an extra allowance herein which may hereafter be made or granted to defendant." (*Folsom* agt. *Van Wagner*, 7 *Lans.*, 309.)
 13. *Held*, that defendant was entitled to judgment and an extra allowance, in addition to taxable costs,

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- under section 309 of the Code. (*Id.*)
14. *Held*, also, that there was a "recovery of judgment" by defendant, within the meaning of section 303 of the Code. (*Id.*)
15. It seems a recovery of judgment is not necessarily a condition precedent to allowance of costs. (*Id.*)
16. No judgment can be entered upon a remittitur of an order of this court reversing an interlocutory order of the supreme court, nor can the costs of the appeal be adjusted by the clerk. The proceedings are interlocutory, and costs are to be adjusted and collected as other interlocutory costs are collected. (*Brown* agt. *Leigh*, 50 *N. Y. R.*, 427.)
17. Upon motion to set aside a judgment for costs entered upon such a remittitur, the court may make a proper order for the recovery of the costs; but its refusal so to do does not affect a substantial right, and is not appealable. (*Id.*)
18. Appeals to this court from orders are not within the exceptions of subdivision 5 of section 307 of the Code. But where costs are given the successful party, is entitled to full costs. (Code, § 307, sub. 6.) (*Id.*)
19. Where, upon appeal to this court from an order granting a new trial in an equity case, the order is affirmed and judgment absolute ordered against appellant "without costs to either party," this disposes of all the costs in the action, and an insertion by respondent of costs in the judgment entered upon the remittitur is irregular. (*Patten* agt. *Stitt*, 50 *N. Y. R.*, 591.)
20. A motion to correct the judgment is the proper remedy. Whether an appeal from the judgment is proper in such case, *quere*. (*Id.*)
21. A judgment should not be set aside on account of an improper taxation of costs, or a taxation without notice. A readjustment should be ordered, and the amount of reduction, if any, be deducted from the judgment. (*Watson* agt. *Gardiner* [Mem.], 50 *N. Y. R.*, 671.)
22. Where two causes of action are set forth in the complaint, and the defendant succeeds in his defense to one of them, but a judgment is obtained against him upon the other, he is not entitled to costs for the successful defense. (*Id.*)
23. Where, in a case tried by a referee, there is no stipulation as to referee fees, it is incumbent upon the party succeeding to show, affirmatively, that the referee was personally present, engaged in the reference, for days enough to make, at the rate of three dollars per day, the sum charged in the bill of costs. (*Id.*)
24. An allowance of ten dollars motion costs, to abide the event in an order granting a reference, is proper. (*Id.*)
25. Plaintiff claimed as a copartner and recovered a one-fourth interest in a lease taken by defendants in their own name. An extra allowance was granted him under the second clause of section 309 of the Code, based upon the value of the lease. *Held*, error; that the subject of litigation was simply the one-fourth the value of the lease, and, adopting either of the three classes specified in said clause, the recovery, the claim or the subject-matter involved, it would embrace not the whole value of the lease, but only the one-fourth thereof. (*Struthers* agt. *Pearce*, 51 *N. Y. R.*, 365.)
26. On appeal from a judgment of a justice's court a new trial was had in the county court, and a verdict found for the plaintiffs for \$85.

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The defendant on a case and exceptions, moved for a new trial, which was denied with \$10 costs to the plaintiffs. The defendants appealed to the supreme court from the judgment, and from the order denying a new trial. The supreme court, at general term, decided to affirm in part, and reverse in part, and made an order in these words: "Judgment reversed as to the first cause of action, and affirmed for the debt of the defendant T. E., for \$22.98, with interest * * *with costs of appeals to the appellants.*" The clerk taxed for the defendants, costs of the county court, and \$10 costs of motion for new trial, in that court, and \$60 on appeal from the order, and \$60 on appeal from the judgment, and disbursements in the justice's court, and in the supreme court. On appeal from the taxation *held*, 1. That under section 306 of the Code, the general term had the right, as well as power, to exercise its discretion in respect to the costs of the appeals in this court. 2. That the order of the general term having declared the affirmance and reversal to be "with costs of appeals to the appelants," such order was binding, and controlled, until modified; notwithstanding an expression in the opinion of the court to the contrary. 3. That the "appeals" referred to, in the order, were the appeals to the supreme court. 4. That in virtue of the order made by the general term, the appellants were entitled to tax the costs of appeals to the general term, with the disbursements made upon such appeals. 5. That the appellants were entitled to the costs and disbursements of the appeal from the order, as well as to the costs and disbursements of the appeal from the judgment; *i. e.*, \$60 on appeal from the order, and \$60 on appeal from the judgment, and disbursements in the supreme court. 6. That the defendants improperly included in the taxation the item of \$10 "costs, motion for new

trial." 7. That the costs of the justice's court, and the costs of the county court, were improperly allowed to the defendant, by the clerk. (*Lennox* agt. *Eldred*, 65 *Barb.*, 526.)

27. A party's right to costs of a motion rests upon the order, not upon any statute; as costs of motions are in the discretion of the court. (*Id.*)

COUNTER-CLAIM.

1. In an action upon a contract, a balance due defendant upon an unsettled partnership account between the parties, which partnership was dissolved prior to the commencement of the action, is a proper counter-claim; and defendant can ask for an accounting, and the application of the balance found due him in extinguishment of plaintiff's demand. (*Waddell* agt. *Darling*, 51 *N. Y. R.*, 327.)
2. The board of trustees of Oakland, California, granted to the plaintiffs the exclusive privilege of running a ferry between that place and San Francisco. The plaintiffs, in consideration of a certain per centage of the receipts from the ferry, assigned and transferred to the defendants such rights as they had under the ordinance and grant of the trustees of Oakland; not covenanting that the privileges and rights of ferriage so assigned were "exclusive." In an action for an accounting by the defendants as to the receipts from the ferry, and for payment of the plaintiffs' share; it was *held* that in the absence of any covenant on the part of the plaintiffs that the ferry privilege was exclusive, it was not competent for the defendants to allege, as a counter-claim or defense, that the town of Oakland had not the power to confer the exclusive right of ferriage, and that thereby the defendants had sustained damages. (*Carpentier* agt. *Minturn*, 65 *Barb.*, 293.)

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COURT OF APPEALS.

1. This court is bound by the decisions of the court of appeals, and must enforce the law as that court declares it; unless the supreme court of the United States, on appeal from the judgment of the court of appeals, should reverse it; in which case, this court will give effect to that decision, in the case in which it is made. (*The Town of Venice* agt. *Breed*, 65 Barb., 597.)
2. But whether the legal principles enunciated by the federal court shall be applied in other cases, must be asserted by the court of appeals; especially when the views of the two courts differ, as to the law. (*Id.*)

CRIMINAL LAW.

1. Where on a writ of error the prisoner claims that his trial, conviction and sentence for a felony should be reversed on the ground that it does not appear that the prisoner was present on the trial, and because it does not appear that the prisoner before sentence was asked what he had to say why judgment should not be pronounced against him, must cause to be made up and returned to this court a judgment record. (*Dent* agt. *People*, ante, 264.)
2. The return to the writ of error, which contains merely the indictment, the testimony, the charge of the court, the verdict and sentence, which is the ordinary return on a bill of exceptions, is insufficient to present the grounds urged for a reversal by the prisoner. (*Id.*)
3. Although many of the technicalities of former times are still permitted to shield offenders from the punishment due to their crimes, notwithstanding the reasons which justified their adoption have long since passed away, yet the courts are gradually applying the more wise and safe rule that no error shall avail a prisoner, unless it manifestly appears that it may have done him some material injury. (*Per MULLIN, P. J.*) (*Fralich* agt. *The People*, 65 Barb., 48.)
4. Whether the court below was right or wrong in allowing questions to be put to the prisoner, and others, on the trial, with the view of impeaching his testimony, what the prisoner said, at any time after the commission of the offense is competent against him as admissions; and these admissions can be proved by himself, or any other person who knew of them. (*Id.*)
5. When a prisoner on trial, takes the stand as a witness in his own behalf, he is subject to the same rules of examination, and to be contradicted as any other witness. (*Id.*)
6. The counsel of a prisoner cannot be heard to assail the charge of the court, upon the trial, when he has not excepted to it, or the exception is too general to be available. (*Id.*)
7. Upon a writ of error the court has no power to hear a motion for a new trial upon the ground that, since the trial, material evidence, favorable to the prisoner, has been discovered. (*Id.*)
8. If such a motion can be made in any court, it must be made in theoyer and terminer. It cannot be made, in the first instance, at the general term. (*Id.*)
9. An indictment, in addition to the charge of grand larceny for which the prisoner was tried, contained an averment that the prisoner had been tried and convicted, previously, of grand larceny, and sentenced to the State's prison, from which he had been duly discharged and remitted of such judgment. It was

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objected that there was no *proof* that the prisoner was duly discharged and remitted of such sentence. The record showed a conviction on the 6th of February, 1871, and a sentence to imprisonment for one year. The present indictment was found in June 1872. *Held*, that the fact that the term for which the prisoner was convicted had expired was sufficient evidence, to go to the jury, as to his being discharged of that conviction. (*Johnson* agt. *The People*, 65 *Barb.*, 342.)

10. It was also objected that, admitting the record in evidence, before the prisoner was convicted of the second offense, was proving his bad character, before he had put his character in issue. *Held*, that this, undoubtedly, would be the rule, if the object was merely to prove bad character; but that the record was not offered for that purpose, but to prove a fact which the legislature had made proper to be proven, viz., a previous conviction. (*Id.*)

11. That there is nothing in the statute, which requires the prior conviction to be averred in the indictment. But if the matter is properly inserted therein, it may with propriety be proved, on the trial, and the verdict of the jury taken thereon. (*Id.*)

12. That the inquiry is sanctioned by law, and so far it must be considered as altering the rule as to character, which would otherwise exclude such evidence. (*Id.*)

D.

DAMAGES.

1. In an action to recover damages for the breach of a contract to support the plaintiff during her life, *prospective damages* may be allowed, and the introduction as evidence of the Northampton tables, to

show the probabilities of the plaintiff's life, is proper on that point. (*Schell* agt. *Plumb*, *ante*, 11.)

2. In an action to recover damages by reason of defendant *wrongfully and willfully* taking and using plaintiff's horse for several days, it is competent for the plaintiff on the trial to prove *as damages*, that he was compelled to hire another horse and pay a certain amount therefor, during the absence of defendant with his horse; and also to prove *as damages* injuries to the horse by the defendant during the same time. (*Clinton* agt. *Townsend*, *ante*, 42.)

3. In estimating damages resulting from repudiation of contract, a referee must base the same upon proof of performance, on the part of the plaintiff, of the several conditions of his contract, and not upon mere speculation and conjecture. (*Halloway* agt. *Stephens*, *ante*, 363.)

See EVIDENCE.

Stapenhorst agt. *Am. Manufacturing Co.*, *ante*, 510.

DEBTOR AND CREDITOR.

1. Under particular circumstances, a creditor of the estate of a deceased person may maintain an action to collect his debt from a debtor to the estate. (*Fisher* agt. *Hubbell*, 65 *Barb.*, 74.)

DEFAULT AND INQUEST.

1. A judge at a special term has no power to make a waiver of a material issue in the pleadings a *condition* of opening a default and inquest taken at the trial term. Such an order is appealable as involving a substantial right. (*Horn* agt. *Brennan*, *ante*, 479.)

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DEMURRER.

1. A *demurrer* cannot be stricken out as sham. (*Kain* agt. *Dickel*, ante, 208.)

See *SALE*.

Dusenbury agt. *Dusenbury*, ante, 417.

DEPARTMENT OF DOCKS.

1. The *Commissioners of the Department of Docks* of the city of New York have authority by statute to give a written permit to a person to use the side of a *pier* in the city and the water adjacent thereto, for a *floating bath*, to carry on the business of a bathing establishment, during the pleasure of the board, with the consent of the lessee of the pier. (*Hoefst* agt. *Seaman*, ante, 24.)
2. The act of 1871 provides that the powers and duties therein conferred upon the dock commissioners shall not affect the powers of the *harbor-masters* as now defined by law. But the powers and duties of these several officials, as defined by statute, are wholly distinct and separate. (*Id.*)
3. The harbor-masters have no power to remove such floating bath without its being established either that it is an essential interference with *navigation*, or that a necessity exists for its *immediate* use for the purposes of commerce. Until one or both of these questions of fact are determined, the owner of the bath will be protected in his lawful possession by *injunction*. (*Id.*)
4. The *Department of Docks* in the city of New York have no authority to allow persons to build sheds or other buildings for the protection of freight or for any other purpose, on the piers or wharves of the city. (*People* agt. *Mallory*, ante, 281.)
5. The only power conferred upon the Department of Docks in reference to wharves, piers and slips being that which had been conferred by acts of the legislature or by charter upon the corporation of the city of New York, and its officers connected therewith, and others in relation thereto, and none of them contained the general power to erect or permit the erection of any such incumbrances. (*Id.*)

DISCOVERY OF BOOKS AND PAPERS.

1. In obtaining an order for the *discovery of books and papers*, it is improper to insert in it the consequences of not obeying it, such as that the defendants be precluded from making any defense, and their answer be stricken out, &c. (*Rice* agt. *Ehle*, ante, 153.)
2. Such an order can only be made after the party is proved to be in default, and no benefit can result from inserting in it which of the several penalties will be inflicted if the discovery be not made. (*Id.*)
3. But the insertion of such a provision, which seems to be sanctioned by Rule 16, cannot render the order for discovery irregular or invalid. It is simply an unnecessary provision and harmless. The provisions of the Code relating to discovery furnish no authority for inserting such a provision in the rule. (*Id.*)

DIVORCE.

1. Where there is no sufficient evidence that the husband had the venereal disease, or that he communicated it to his wife, she cannot obtain a divorce from him for adultery without further testimony. (*Homburger* agt. *Homburger*, ante, 346.)

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E.

EQUITY.

1. Equitable relief, in cases of penalties and forfeitures, is limited to such cases as admit of compensation, according to the original intent of the parties. (*Giles* agt. *Austin*, ante, 269.)
2. In cases where the penalty or forfeiture is designed to secure the payment of a certain sum of money, a court of equity will afford relief on payment of the money secured, with interest. (*Id.*)
3. As to the covenants in question contained in the lease, the principal end to be attained was the payment to the landlord of the rent reserved, and the discharge of the estate from the taxes and assessments which might be imposed during the term. The right of re-entry reserved to the landlord is the ultimate sanction operating to secure the performance of the tenant's obligations under the lease. (*Id.*)

See BANK CHECK.

Nat. Bk. Commerce, agt. *Nat. Mech. Banking Association*, ante, 374.

4. Where there is no complete remedy at law, an action in equity is the proper remedy to recover possession of a *deed*—a paper title of certain property in Ireland. (*Browne* agt. *Cochran*, ante, 427.)

See SPECIFIC PERFORMANCE.

Burling agt. *King*, ante, 452.

EQUITABLE RELIEF.

1. A right to use the waters of a well, as owner of land on which it stands, must be asserted at law; but where it is sought to restrain interference with the enjoyment of

an easement to use a well on another's land, the action is equitable. (*Applegate* agt. *Morse*, 7 *Lans.*, 59.)

ESTOPPEL.

See CLAIM AND DELIVERY.

Talcott agt. *Belding*, ante, 419.

EVIDENCE.

1. It is proper to show that a witness has made a statement inconsistent and irreconcilable with the *facts* to which he has testified. And if he denies that he has made any such statement, then to show that he has. And it is immaterial whether it be a statement of fact or the expression of an opinion, if it be adverse to his testimony. (*Schell* agt. *Plumb*, ante, 11.)
2. Where the rejection of the testimony of a witness offered in evidence on the trial is relevant, and therefore the rejection is error, yet the judgment will not for that reason be reversed, where it can be seen that the offered testimony is not of sufficient importance, when compared with the merits of the case, to have changed the verdict of the jury or affected the judgment in the case. (*Townsend* agt. *Narragansett Ins. Co.*, ante, 40.)
3. Where the *date* of a trip by witness to a certain place is material, on the trial of a civil action, it is not material whether the witness swearing on that subject, knew that the hotel where he staid kept a register. Therefore, although he swore intentionally false on the trial that he did not know such hotel kept a register, yet he was not guilty of perjury (see 3 *Parker*, 510). (*People* agt. *Pearsall*, ante, 121.)
4. Where a witness states a transaction occurred on a given *date*, he has no right to confirm or cor-

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roborate his evidence by showing a paper made and signed by him at that date. (*Id.*)

5. In this case it was *held*, that a witness called for the defense on cross-examination could not be asked whether he had not made a statement out of court inconsistent with what he had now sworn to in court (*see* 50 *New York*, 392; *also* *Schell* agt. *Plumb*, *ante*, p. 11). (*Id.*)

6. It is undoubtedly the rule that when a witness on *cross-examination* testifies to a *collateral matter*, the party making the cross-examination is not allowed to contradict that testimony, because a contrary rule would lead to the trial of numerous collateral issues. (*Newberry* agt. *Furnival*, *ante*, 139.)

7. But this rule never applies to testimony which is not collateral and which is material to the issue. When a party on cross-examination brings out evidence material to the issue, he is not necessarily bound by it, but may contradict it by other testimony. (*Id.*)

8. Where plaintiffs' witness was allowed to testify against defendant's objection and exception, that from the first of January to the first of June of the preceding year, plaintiffs had about 200 customers, from which they realized a profit of not less than \$1,000 per month, and which subsequently were all lost. (*Stapenhorst* agt. *Am. Man. Co.*, *ante*, 510.)

9. *Held*, that the reception of this evidence was erroneous for several reasons. 1st. The complaint did not allege the *names* of said customers. 2d. It did not even contain an averment of loss of customers as an item of *special damage* in general terms. 3d. The evidence already given, showed affirmatively that no damage had occurred prior to 1869, and consequently the testimony related to a

period too remote in any aspect of the case. (*Id.*)

See NEW TRIAL.

Carnes agt. *Platt*, *ante*, 520.

10. Letters, written by a person who is not a party to the suit, are not admissible in evidence; being nothing but the mere declarations of the writer, not even sworn to. Their contents should be proved by the writer as a witness, if he has knowledge of their contents. (*Hildreth* agt. *Shepard*, 65 *Barb.*, 265.)

11. Such letters cannot be read for the purpose of impeaching the writer, by a party who has previously examined him as a witness. (*Id.*)

12. Great latitude should be allowed on cross-examination. It is the test of truth, and unless the matters proposed to be proved are clearly incompetent, the evidence should be received. (*Id.*)

13. Declarations of a former holder of a note are not competent evidence against any person deriving title from him. (*Osborn* agt. *Robbins*, 7 *Lans.*, 44.)

14. It is competent in equity to prove by parol that a deed, absolute on its face, was intended as a security for a loan, and without regard to the question whether it was given through fraud or mistake. (*Brown* agt. *Clifford*, 7 *Lans.*, 46.)

15. If the county judge issues an attachment for disobedience to his order under § 294, it is presumed to have been issued on proper proof of the fact. (*Miller* agt. *Adams*, 7 *Lans.*, 131.)

16. The place of birth cannot be proved by hearsay; *e. g.*, by declarations of parents, although it, seems, pedigree may be. (*McCarty* agt. *Terry*, 7 *Lans.*, 236.)

17. Parol evidence that one of two joint makers of a note signed as

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surety is not competent. (*Campbell* agt. *Tate*, 7 *Lans.*, 370).

18. Books of original entry, and also books of entries transcribed from lost books of original entry, are admissible in evidence as memoranda of witnesses who testify to delivery of the items of the account. (*Green* agt. *Disbrow*, 7 *Lans.*, 381.)

EXECUTION.

1. An execution against the person of the judgment debtor can be issued only to a county within the jurisdiction of the court, after the return of an execution against his property returned unsatisfied in whole or in part (*Code*, § 288). (*Noe* agt. *Christie*, *ante*, 496.)
2. The defendant in this case being in the custody of the sheriff of the city and county of New York, under and by virtue of an execution issued against his person, upon a judgment of this court, plaintiff had no right to issue subsequently upon the same judgment another execution against defendant's person to the sheriff of Richmond county. (*Id.*)
3. The arrest under the first execution was a satisfaction of the judgment while the imprisonment continued; and the issuance of the second was in direct violation of the provisions of the Revised Statutes (2 *R. S.*, 364, § 7; 3 *id.*, 5th ed., 643, § 7). (*Id.*)
4. While the defendant was under arrest, under the aforesaid execution, another execution against his person was issued to the county of Richmond where he resided, upon another judgment against him in this court. Held, that both executions be set aside, with costs. (*Id.*)

See SHERIFF.

Crofut agt. *Brandt*, *ante*, 481.

EXECUTORS AND ADMINISTRATORS.

1. The court will take judicial notice of the population of counties and the public officers therein. (*Farley* agt. *McConnell*, 7 *Lans.*, 428.)
2. The statute which requires the surrogate to examine the applicant for the letters, as to the time, &c., of death, is merely directory. (*Per MILLER*, P. J.) (*Id.*)
3. Under particular circumstances a creditor of an estate of a deceased person may maintain an action to collect his debt from a debtor to the estate. (*Fisher* agt. *Hubbell*, 7 *Lans.*, 481.)

F.

FINDINGS OF FACT AND LAW.

1. A general finding of a referee, like a general verdict, is controlled by a special finding of fact. (*Phelps* agt. *Vischer*, 50 *N. Y. R.*, 69.)
2. It may be assumed, in order to sustain a judgment rendered upon the report of a referee, that a finding of fact was sustained by evidence given upon the trial, although such evidence does not appear in the case on appeal. (*Tryon* agt. *Baker*, 7 *Lans.*, 511.)

FIRE-WORKS.

1. A valid contract may be made by city authorities for the purchase of fire-works of over \$250 in amount, for celebration purposes, without advertising for bids therefor. (*Detwiller* agt. *Mayor, &c.*, *N. Y.*, *ante*, 218.)
2. It is not a valid objection to the payment of such a claim against the city that there is no money in the treasury applicable thereto

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and appropriated therefor, because: (*Id.*)

3. 1st. The expenditure was not incurred by any head of a department or any officer of the city government; it was entirely independent of either, and did not, therefore, come within the provisions of section 28 of the charter of 1857; (*Id.*)

4. 2d. The objection of a want of appropriation is answered by the resolution of the common council, which appropriated for this purpose the sum of \$30,000; and the plaintiff was not bound to inquire further than to see that the appropriation was duly made. (*Id.*)

FOREIGN CORPORATIONS.

1. When a foreign corporation is sued here for a cause of action which has arisen in this State, and its officers or attorney desire to have the benefit of section 427 of the Code, the objection to the jurisdiction must be made in proper time. It is too late to raise the objection after an unqualified appearance in the action. (*Carpentier* agt. *Minturn*, 65 Barb., 293.)

2. The non-residence of the plaintiff, in an action against a foreign corporation, is matter in abatement merely, and is waived by appearing and pleading in bar. (*Root* agt. *The Great Western Railway Co.*, 65 Barb., 619.)

FORMER SUIT OR RECOVERY.

1. The pendency of an action brought against persons claiming title under a referee's deed, to set aside such deed as fraudulent, and for the recovery of the possession of the premises, may be pleaded in abatement of, or as a bar to, subsequent actions brought by the same plaintiff against each of the defendants in that action, to recover the pos-

session of the same premises, and for mesne profits. (*Darvelly* agt. *Brown*, 65 Barb., 107.)

2. A judgment in a former action is not a bar to a second action for the same cause, if at the time of the rendition of the judgment in such former action, the cause of action had not accrued. (*Marcellus* agt. *Countryman*, 65 Barb., 201.)

3. Parol evidence is admissible to show that the demand in the second suit was not recovered for in the first, and the reason why it was not. For this purpose, the testimony of a juror in a former suit is properly received. (*Id.*)

FRAUDULENT REPRESENTATIONS.

1. The plaintiff brought his action against the defendants as incorporators and directors of a company formed pursuant to the general laws of the state for ocean steam navigation, under the name of "The New York and Bremen Steamship Company," charging them, first, with fraudulently and corruptly combining to organize said company for the purpose of deceiving such of the public as might be induced to become stockholders therein; and secondly, with inducing, by false and fraudulent representations, the plaintiff to purchase twenty-seven shares of the capital stock of the par value of \$100 each. (*Nelson* agt. *Luling*, ante, 355.)

2. Held, that the facts and circumstances shown by the plaintiff, including his own evidence, when considered in its entirety, fell quite short of establishing that the New York and Bremen Steamship Company was organized by the defendants with the intent of deceiving and cheating the public or the plaintiff. Fraud in such a case cannot be presumed, but must be affirmatively established. (*Id.*)

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See SATISFACTION OF JUDGMENT.

Slocum agt. *Bremen*, ante, 437.

G.

GENERAL TERM.

1. Where a judgment in an action tried by the court or a referee is reversed by the general term and new trial ordered upon questions of fact, the general term is not required to specify, in its order, the particular errors of fact to authorize a review in this court; it is sufficient if the order states generally that the reversal was based wholly, or in part, upon errors of fact. (*Hubbell* agt. *Meigs*, 50 N. Y. R., 480.)
2. The general term has not only authority but it is its duty, where the facts established require it, to reverse a judgment as to one or more of several joint defendants, and affirm it as to others. (*Id.*)

H.

HUSBAND AND WIFE.

1. Since the act of 1853 (*Laws of 1853, chapter 576*) which declares that an action may be maintained against husband and wife, jointly, for any debt of the wife contracted before marriage, but that the execution on any judgment in such action shall issue against the separate property and estate of the wife, only, the husband may be joined with his wife, as a defendant, in an action to recover a debt contracted by her before marriage. (*Lennox* agt. *Eldred*, 65 Barb., 410.)

I.

INFANT.

See ARREST.

Schunemann agt. *Paradise*, ante, 426.

INJUNCTION.

1. This action was brought to restrain the Atlantic and Pacific Railroad Company, a corporation chartered by congress in July, 1866, from paying the rents reserved in a lease made to it by the South Pacific Railroad Company of Missouri, a corporation chartered by the legislature of Missouri. The rent being payable for the use of the railroad constructed and operated by the lessor, and five other railroads previously leased and demised to the South Pacific Railroad Company of Missouri. (*Dinsmore* agt. *Atlantic and Pacific R. R. Co.*, ante, 193.)
 2. Held, That as such powers, to take these leases, were neither designed nor given to defendant's corporation, the leases of the road from Franklin through Jefferson City westerly, as well as the assignments of the leases of the other five roads, would seem to be void for want of authority in the Atlantic and Pacific Railroad Company to receive them. (*Id.*)
 3. And that would result in avoiding the lease from Franklin to St. Louis, as the rent to be paid for all consists of an entire amount incapable of apportionment, and this would constitute a good reason for enjoining the payment altogether. (*Id.*)
- See LIEN.
Pusey agt. *Bradley*, ante, 255.
- See LANDLORD AND TENANT.
Trenor agt. *Jackson*, ante, 389.
4. An injunction will not issue to restrain the disbursement of the plaintiff's portion of a tax, to meet interest on town railroad bonds issued without authority, where the commissioners holding the tax are abundantly able to answer for its loss. (*Kilbourne* agt. *Alyn*, 7 Lans., 352.)

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5. Where proceedings conducted by one party for his own benefit in the name of another are restrained by an injunction directed to the nominal party, the damages and expenses incurred by the real party in interest in procuring a discharge in law to have been incurred by the defendant on the record, and are recoverable in his name for the benefit of the real party in interest. (*Andrews* agt. *G. W. Co.*, 50 *N. Y. R.*, 282.)

6. On an assessment of damages upon an undertaking given upon the granting of a temporary injunction which restrained legal proceedings for the collection of a demand, it is not competent to go into the merits of the proceedings restrained, unless the party prosecuting the reference claims as damages for loss of his demand. (*Id.*)

7. Expenses properly incurred on the part of the defendant for the purpose of dissolving an injunction are legally allowable as damages, and when a motion has been made to dissolve the injunction, which was denied, not upon the merits or for irregularity, but because the court in its discretion thought it advisable to defer the inquiry into the merits until the final hearing, the expenses of the motion and also counsel fees upon the trial are proper items of damages. (*Id.*)

8. Counsel fees for the trial of an action in which a temporary injunction has been issued cannot be recovered as damages upon the undertaking given upon the granting of the injunction unless it appear that such expenses were incurred by reason of the injunction. (*Hovey* agt. *R. T. P. Co.*, 50 *N. Y. R.*, 335.)

9. A party is entitled to damages for all expenses which he has incurred for fees and for legal expenses in removing the temporary injunction, and also any damages to his

business or otherwise necessarily resulting from it. (*Id.*)

10. The right to a preliminary injunction or to an injunction *pendente lite* rests in all cases in the discretion of the court of original jurisdiction. An order, therefore, dissolving such an injunction does not affect a substantial right, and is not reviewable in this court. (*People* agt. *Schoonmaker*, 50 *N. Y. R.*, 499.)

INSURANCE.

1. A policy of insurance misstated the section of a warehouse in which the property intended to be insured was located as section C, whereas it was really section A. (*Bryce* agt. *Lorillard Fire Ins. Co.*, *ante*, 498.)

2. In an action brought to reform the policy and recover under it, judgment was given for the defendant. The plaintiff's only important exceptions on the trial, were to evidence showing the character of the sections as separate buildings. He, however, stated no ground of objection. There was evidence upon which all the judge's findings of fact, and his additional findings and refusals to find, could be based. (*Id.*)

3. The judgment was affirmed at the general term. (*Id.*)

4. *Held*, that the findings could not be disturbed; as in order to a review by this court of a finding of fact, there must be no evidence to support it; and in order to such review of a refusal to find a fact, the evidence in favor of the proposed finding must be clearly conclusive. (*Id.*)

5. That the policy could not be reformed, as there was neither a mistake of both parties whereby the intentions of both parties failed of expression, nor a mistake

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of one party causing a failure to express his intention, with a fraudulent attempt in the other party to take advantage of such failure. (*Id.*)

J.

JOINT DEBTORS.

1. In an action against three defendants who were copartners and for a partnership debt, who appear and answer by the same attorneys and by a joint answer, and two of the defendants have compromised and settled their proportion of the joint liability, a notice of trial served by the plaintiff in the action, in the ordinary form upon the surviving attorney, the other having died, with a notice indorsed on the same, to the effect "that no personal claim is or will be made on the trial of the cause as against the defendants who have compromised, either for damages or costs, and that judgment will be demanded only as against the defendant who has not settled for the amount of damages and costs for which he may be liable," is regular as to all the defendants. (*Saxton* agt. *Dodge*, ante, 467.)
2. And where, on the trial of the cause under such notice, the attorneys for the defendants announce that they appear on the trial only for and in behalf of the defendants who have compromised, and not for the other defendant, a verdict against all the defendants, and the judgment entered thereon against all the defendants, is a verdict regularly rendered and a judgment regularly entered as against all the defendants. The proceedings on the part of the plaintiffs in procuring judgment in such a case are regular. (*Id.*)

JOINT DEFENDANTS.

1. Where an action is brought against two or more upon a joint

contract, and equitable defense peculiar to one defendant being set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff. (*Barker* agt. *Cocks* [Mem.], 50 N. Y. R., 689.)

JUDGMENT.

1. A satisfaction piece of a judgment in favor of a corporation, which shows upon its face that it was executed by its president in his official capacity, is binding upon the corporation, although not executed in the name of or under the seal of the corporation. (*Booth* agt. *Farmers' and Mechanics' National Bank*, 50 N. Y. R., 396.)
2. A judgment may be assailed collaterally, for fraud, by persons not parties to it, or privies who are injured by it. Thus it is competent for a creditor to assail collaterally a judgment against his debtor, for that cause. (*Spicer* agt. *Waters*, 65 Barb., 227.)
3. Although it is more in conformity to the established practice to require the successful party to move for costs, yet a judgment should not be set aside—when it appears that the right to costs was clearly established—merely because it was entered up by such party without having obtained an order allowing him costs, on a motion made for that purpose. (*Hees* agt. *Nellis*, 65 Barb., 440.)
4. The court has power to control its judgments and process; and the power may be summarily exercised, to prevent the property of a *bona fide* purchaser from being sold. (*Id.*)

JUDGMENT CREDITOR.

1. A fraudulent intent being established against the vendor and

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vendee in a conveyance for a valuable consideration, by a judgment creditor of the vendor, he is not entitled to judgment setting aside and annulling the conveyance, but only that the property be sold and his judgment paid out of the proceeds. (*Orr* agt. *Gilmore*, 7 *Lans.*, 345.)

JUDICIAL DECISIONS.

1. It is not for an inferior court to disregard a decision of the court of last resort; but on the other hand, it is its duty to give such decision full effect, whatever its views may be as to the correctness or wisdom of such decision. But when that court departs from its own decisions, and leaves it uncertain what its views are, upon a question of law, it is the duty of the court below to give effect to the latest expression of the views of the superior court; leaving it to determine which is the sounder, the earlier or the later conclusions. (Per *MULLIN*, P. J.) (*Costello* agt. *The Syracuse &c., Railroad Co.*, 65 *Barb.*, 92.)

JURISDICTION.

1. An order under § 294, Code, requiring one having property of or indebted to a judgment debtor to appear and answer, &c., is within the jurisdiction of the judge of the county to which execution has issued on the judgment. (*Miller* agt. *Adams*, 7 *Lans.*, 136.)
2. An order obtained on incompetent evidence of jurisdictional facts, from a court of record, or officer acting judicially in determining the question of jurisdiction, is, in the absence of bad faith, protection to the party instituting the proceedings therefor. (*Id.*)
3. In an action on a bill of exchange against an insolvent national bank of another state, which has funds deposited in a bank in this state, and in which action an attachment is issued on behalf of the plaintiffs and said funds are attached, this court has jurisdiction of the action and of the attachment proceedings under it. (*Allen* agt. *Scandinavian Bank*, ante, 71.)
4. The receiver of such foreign national bank not being a party to the action, has no status which authorizes him to move to set aside the attachment proceedings. (*Id.*)
5. Where the receiver of such foreign national bank files a bill in equity in the United States circuit court against the plaintiffs in the attachment suit and the sheriff who served the attachment, and moves the court upon the bill and upon affidavits for an injunction to stay all proceedings in the attachment suit and for a receiver to take charge of the funds pending the litigation, on the ground that the United States court has exclusive jurisdiction of said insolvent national bank and is entitled through its receiver to the custody and control of the funds so attached, the motion both for the injunction and receiver will be denied. (*Id.*)
6. The superior court of the city of New York has jurisdiction to grant a divorce and allow alimony where the parties are properly before the court. (*Kamp* agt. *Kamp*, ante, 143.)
7. The jurisdiction of courts of equity to grant relief in cases of fraud and trust was not abolished by the statute which instituted a creditor's bill upon a judgment and an execution returned unsatisfied. (*Id.*)
8. But it is well settled that an action to set aside a fraudulent conveyance may be maintained by a creditor without judgment, who is otherwise remediless. (*Id.*)

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9. This court has jurisdiction of an action brought by an *assignee in bankruptcy*, to recover money and property from the defendants alleged to have been previously conveyed to them by the bankrupt in fraud of the act of bankruptcy, passed by congress March 2, 1867. (*Gilbert* agt. *Crawford*, *ante*, 222.)

JURY.

1. Upon the trial of an indictment before the superior court of the city of Buffalo, in case the regular panel of jurors is exhausted, and it becomes necessary to summon talesmen, the court is not limited to the method prescribed by the twenty-ninth section of the act creating said court (§ 29, chap. 96, Laws of 1854, as amended by chap. 754, Laws of 1857), but it has power to order talesmen to be summoned in pursuance of the provisions of the Revised Statutes. (2 R. S., 733, § 3.) (*Gaffney* agt. *The People*, 50 N. Y. R., 416.)
2. A resident and a tax-payer of a city is incompetent as a juror in an action wherein the city is interested, except in an action to recover a penalty or forfeiture (2 R. S., 557, § 2), unless by provision of the city charter such disqualification is removed. (*Diveny* agt. *City of Elmira*, 51 N. Y. R., 506.)
3. A party to an action on trial by a jury, is entitled to have all the proceedings public, both in respect to the production of proof, and to the instructions to the jury by the court; and there ought to be no communication between the judge and the jury, after the latter have gone from the bar to consider their verdict, in relation to the oral evidence or his instructions to them, unless it take place openly in court, or with the express assent of the parties. (*W. B. and L. Co.* agt. *Mix*, 51 N. Y. R., 558.)

4. This right is a substantial one and is not in the discretion of the court, and an order denying motion for a new trial, which motion was based upon the violation of this right, is appealable to this court. (*Id.*)

5. A party moving for a new trial upon the ground of a communication between the judge and the jury without his knowledge or assent, is not bound to show affirmatively that such communication tended to his injury. (*Id.*)

JUSTICES OF THE SUPERIOR COURT OF THE CITY OF NEW YORK.

1. The provision of the act establishing the superior court of the city of New York (§ 23, chap. 137, laws of 1858), which authorizes the chief justice and associate justices thereof to perform all the duties which a justice of the supreme court is authorized to do out of term, is general and unrestricted, and authorizes them to perform all the duties of a justice of the supreme court at chambers. A justice of said court has authority, therefore, to issue an attachment on a lien claimed under the act providing for the collection of demands against ships and vessels (*Chap. 482, Laws of 1862*). (*Delaney* agt. *Brett*, 51 N. Y. R., 78.)

L.

LACHES.

See SALE.

Depew agt. *Depew*, *ante*, 441.

See APPEAL.

Brown agt. *Niess*, *ante*, 465.

LANDLORD AND TENANT.

1. A tenant has no right to build a wooden structure or shed called an

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awning running on both sides of a corner store which he occupies, in the city of New York, covering the sidewalk on each side and reaching to the second story of the building, where the lease contains a covenant by the tenant that "he will not make any alterations therein without the written consent of the party of the first part, under the penalty of forfeiture and damages." (*Trenor* agt. *Jackson*, ante, 389.)

2. Although such acts of the tenant are a violation of his covenant (written consent not having been obtained), yet they are not sufficient to authorize the restraining power of the court. The landlord has his remedy at law for damages or by re-entry. But where the landlord brings his case within equity recognition by alleging that the structure is erected upon one of the public streets of the city without authority, and is injurious to his private interests and a public nuisance, it then comes within the restraining power of the court at the suit of the landlord as a private person. (*Id.*)

3. *Held*, that the corporation hold the streets in trust for the public, and by attempting to authorize such appropriation of them by the erection and continuance of this public nuisance by a permit given to the tenant by the commissioner of public works before the structure was commenced, exceeded their power, and the erection of the structure was without authority of law. (*Id.*)

LARCENY.

1. Upon a trial for larceny from the person, where the proof does not warrant a finding of the value of the property at less than twenty-five dollars, a refusal to instruct the jury that the offense is petit larceny unless such value shall be found less than twenty-five

dollars is not error. (*Higgins* agt. *The People*, 7 *Lans.*, 110.)

2. Mere proof of the taking of bills of certain denominations, without proof of their genuineness as bills or circulation media, is insufficient to warrant conviction of larceny. (*Id.*)

3. But it will be assumed on appeal that there was evidence of genuineness upon the trial, if the bill of exceptions does not show that it contains all the evidence given. (*Id.*)

4. The taking of property from the person less than twenty-five dollars in value, and of bills of denominations exceeding in the aggregate that amount, but not shown to be genuine having been proved; *held*, that a request to instruct the jury that there was no evidence of a larceny was properly refused. (*Id.*)

5. *Held*, further, that a conviction of grand larceny would be sustained on appeal, in the absence of a statement in the bill of exceptions that it contained all the evidence given at the trial. (*Id.*)

LIEN.

1. In an action to enforce a lien the court has the right, even after the issue joined, to make any person a party who may be necessary to a full determination of the equities involved. (*Pusey* agt. *Bradley*, ante, 255.)

2. While it is questionable whether a creditor who procures a preference by a lien may not be obliged to surrender it in order to commence proceedings under the bankrupt act, it would be against equity to allow him to urge the bankruptcy of his debtor in one tribunal and in another avail himself of the advantages of his lien. (*Id.*)

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3. Proceedings in a state court may be suspended or controlled by the federal courts, not by acting directly on the former, but by acting on the parties through the instrumentality of an injunction. (*Id.*)

M.

MANDAMUS.

1. Where a balance of a *claim* against the county of New York, running from September 1, 1871, to March 1 1872, for cleaning the court-room of the court of common pleas, the original claim being audited by the board of supervisors of the county, such audit is sufficient authority for the comptroller to pay it where no fraud or mistake is alleged. The claim is a proper one against the county. (*People ex rel. Hawley* agt. *Earle*, ante, 267.)
2. Perhaps now it may be necessary to require the auditor of accounts to audit this balance in order to compel the comptroller to pay it. (*Id.*)
3. A mandamus against each officer allowed. (*Id.*)
4. The audit and allowance by the board of supervisors of the county of New York of a *claim* against the county, is conclusive of the right of the claimant to recover it, subject only to the examination and allowance of his *vouchers* by the auditor and the approval of the comptroller thereupon. (*Matter of Brown* agt. *Green*, ante, 302.)
5. The power to examine, settle and allow *accounts* is one thing; this belongs to the board of supervisors. And the power to examine, allow and approve *vouchers* is another thing; this belongs to the auditor and comptroller. (*The case of People ex rel. Ellis* agt. *Flagg*, 15 *How.*, 553 explained.) (*Id.*)
6. Where a laboring man has performed four and a half months of approved labor for the county of New York, and has gone the rounds of circumlocution to have his labor certified to by the officer for whose office the services were rendered, and his bill scrutinized by a committee, and approved, audited and ordered to be paid by the board of supervisors, further technical impediment to its payment should not prevail, especially where the objection is made against the original claim and not against the vouchers thereof. (*People ex rel. Duffin* agt. *Earle*, ante, 308.)
7. The *relator* claimed the balance of an unpaid salary of \$4,820.17 for services as "counsel to the commissioners of taxes and assessments, in the city of New York," for part of the years 1872 and 1873, which the defendants refused to pay. (*People ex rel. Miller* agt. *Green*, ante, 367.)
8. It did not appear that the *relator's* salary was provided for in any of the appropriations made for those years to the commissioners of taxes and assessments; and the amounts apportioned to that department are required to be specifically applied to the purposes specified therein. The *relator* can have, therefore, no remedy by mandamus; but is entitled to have his claim audited, and a mandamus lies to the auditor to adjust the demand. (*Id.*)
9. The provision of the act providing for relief against illegal taxation (§ 1, chap. 938, laws of 1867), authorizing and empowering the boards of supervisors of certain counties therein named, to hear and determine claims for illegal assessments upon United States securities and to repay the amount collected upon such assessments, is mandatory. Upon the presentation of a claim thereunder, the only questions to be determined by the board, and in reference to which it has any discretion, are whether the claimant has such a claim, and, if so, the amount

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thereof. When the fact of the existence of the claim is undisputed, the board has no authority to reject it as illegal, and it can be compelled by mandamus to exercise its discretion upon the facts and the amount of the allowance. (*People ex rel. agt. Board of Supervisors of Otsego County*, 51 N. Y. R., 401.)

10. The relator showed that it owned and was assessed upon United States stocks, that it paid the taxes claimed, and properly presented its claims therefor under said statute to defendant. These facts were not disputed. Defendant adopted a resolution, in substance, that the claim was invalid, and that the same be disallowed. *Held*, that a mandamus directing defendant to hear the claims of relator and to determine whether it paid the taxes, as stated, and, if so, to audit and allow the amount thereof, and cause the same to be levied and collected, as prescribed by said statute, was proper. (*Id.*)

MALICIOUS PROSECUTION.

1. In an action for *malicious prosecution*, where the evidence tended to show that the defendant was informed by a person that the plaintiff did the malicious mischief to defendant's property for which she was prosecuted and arrested by the defendant; but before the defendant had commenced proceedings for such arrest, the same person who gave the defendant the information acknowledged in his presence that he had made a false statement about the mischief, and that instead of the plaintiff doing it, he, the informant himself, did it, and offered to settle the matter: (*Footo agt. Miller, ante*, 38.)
2. *Held*, that a *nonsuit* in the action was improper. There was a question for the jury, whether, after

the last information defendant had received, he commenced his action against the plaintiff in good faith or not. (*Id.*)

MOTIONS AND ORDERS.

1. The finding of a referee, to whom is referred disputed questions of fact arising upon a motion, is not conclusive upon the court. It is but to inform the conscience of the court, and may be adopted or disregarded. (*Marshall agt. Meech*, 51 N. Y. R., 140.)
2. The judge who tries a cause is not authorized to entertain a motion made upon his minutes to set aside a verdict upon the ground that it was contrary to the instructions of the court. (*Tinson agt. Welch*, 51 N. Y. R., 244.)
3. Where a general term order recites the fact of an appeal from the order of special term considered therein, it will be assumed that such an appeal was taken, although no notice of appeal is contained in the case. (*Struthers agt. Pearce*, 51 N. Y. R., 365.)

MUNICIPAL CORPORATIONS.

1. Where a city charter contains a clause empowering the common council "To clean the streets and to pass ordinances requiring the same to be kept clean and in proper order and free from encroachment, incumbrance or injury," they have the power to pass an ordinance prohibiting, under a prescribed penalty, any person from using a wagon or cart on the paved streets for carrying a certain number of pounds or over for a load, unless the tires of such vehicle be of a certain prescribed width. (*City of Utica agt. Blakeslee, ante*, 165.)

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2. But where the ordinance, which fixes the penalty, directs also that the *expense of weighing the load* be added to the penalty, it is unauthorized. The penalty may be recovered, but not the expense of weighing. (*Id.*)

See FIRE-WORKS

Detwiler agt. *Mayor, &c., N. Y., ante, 218.*

See LANDLORD AND TENANT.

Trenor agt. *Jackson, ante, 389.*

N.

NEGLIGENCE.

1. The omission to look both up and down a railroad track before attempting to cross it, is such negligence as prevents a recovery against the railroad company in case of accident. (*Haight* agt. *N. Y. Central R. R. Co., 7 Lans., 11.*)
2. It is no excuse if the precaution is neglected until too late to avoid an approaching train. (*Id.*)
3. An owner of a tenement house is not liable to a person visiting one of the tenants for damage caused by falling down cellar steps opening upon the hallway, where it appeared that the opening was furnished with a good and sufficient covering, which was open at the time of the injury, in the absence of proof of defective or negligent construction, or that the defendant himself negligently left the opening uncovered. (*Kaiser* agt. *Hirth, ante, 161.*)
4. The fact that the owner occupied the house in connection with several of his tenants raises no presumption of negligence against him. Each occupant is answerable only for his own negligence, and there can be no presumption against any particular occupant. (*Id.*)
5. Where on the trial in an action of *negligence*, the evidence given is not of such a character as would authorize the court to determine the diligence or negligence of either side as matter of law, the questions relating thereto on both sides should be submitted to the jury. (*Stapenhorst* agt. *Am. Manufacturing Co., ante, 510.*)

NEW TRIAL.

1. Where the rejection of the testimony of a witness offered in evidence on the trial is relevant, and therefore the rejection is error, yet the judgment will not for that reason be reversed, where it can be seen that the offered testimony is not of sufficient importance, when compared with the merits of the case, to have changed the verdict of the jury or affected the judgment in the case. (*Townsend* agt. *Narragansett Ins. Co., ante, 40.*)

See APPEAL.

Kinney agt. *Pudney, ante, 258.*

2. This case has been three times before the general term of this court. The first time reported in 6 *Robt.*, 270, where the facts are fully stated; the second time, reported in 1 *Sweeny*, 140. (*Carnes* agt. *Platt, ante, 520.*)
3. The court of appeals decided, after the second trial, that certain questions in the case should be tried, as questions of fact, before a jury. On this trial, a verdict for the plaintiff was rendered on these questions (as had been on the two former trials), and the defendant moved, at special term, on a *case and exceptions*, to set aside the verdict and for a new trial, which was denied, and from such order of denial, as well as the judgment, defendant appealed to the general term. (*Id.*)
4. *Held*, that it may be questioned whether, under the provisions of

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the Code, it is not the duty of the general term, in such a case, to examine the evidence, for the purpose of ascertaining whether the verdict should stand. Such examination having been made, it was decided that there was no reason for disturbing the verdict. (*Id.*)

5. Several exceptions were taken by the defendant to the refusal of the court to allow certain evidence offered by him to be submitted to the jury. The most important one was rejected because it called for the disclosure of confidential communications between attorney and client. (*Id.*)

NOTARIES.

1. A notarial certificate, founded upon a presentment and demand made not by the notary, but by his clerk, is void. (*Gantry* agt. *Doane*, 51 N. Y. R., 84.)

NOTICE.

See ATTACHMENT.

O'Brien agt. *Mech's and Trader's Fire Ins. Co.*, ante, 429.

NUISANCE.

See LANDLORD AND TENANT.

Trenor agt. *Jackson*, ante, 389.

P.

PARTIES.

1. Where a defect of parties is apparent on the face of the complaint, but no demurrer is interposed, and no suggestion of the defect made until the argument of an appeal from the judgment, neither party is entitled to costs of the appeal. (*Fisher* agt. *Hubbell*, 65 Barb., 74.)

PARTITION.

1. In actions for the partition of real estate the right of the plaintiff to be an owner should be clear to warrant the court to take the custody of the property out of the possession of those having an apparently valid title, (*Patterson* agt. *McCunn*, ante, 182.)
2. Where the executors and trustees are vested with that right under a will, while the claim of the plaintiff, as an heir-at-law, is doubtful and uncertain, her motion for an injunction and receiver pending her action for partition will be denied. (*Id.*)
3. Where application is made in such action to remove the trustees on the ground of incompetence or improvidence, upon affidavits founded in a great part on information and belief, which are unequivocally denied on behalf of the trustees, there is no propriety in granting the motion on such a state of the testimony, nor in trying such a question in the action on conflicting affidavits. (*Id.*)
4. The Code does not provide for the service of process upon unknown owners in partition cases. The 135th section providing for publication, so far as it applies to unknown parties, is confined to actions for the foreclosure of mortgages. (*Sanford* agt. *White*, ante, 205.)
5. The Revised Statutes, as amended, will apply, and are continued as applicable to partition cases by the 448th section of the Code. (*Id.*)
6. The Revised Statutes (vol. 3, p. 605) and the act of 1842 (p. 363) prescribe the requisite notice to be published with a description of the premises to be partitioned; and without such a description the advertisement addressed to unknown owners is an idle ceremony, and

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the court will not obtain jurisdiction over them. (*Id.*)

7. An objection in partition, that the complaint does not aver that the plaintiff is in possession of the premises, is too late when first made on appeal after judgment; and it seems, although no possession should be proved. (*Howell* agt. *Mills*, 7 *Lans.*, 193.)

8. It seems the objection should be taken by demurrer or answer. (*Id.*)

9. The wife of a tenant in common need not join as plaintiff with him in an action to partition his property. She is a necessary party, but more fittingly a defendant than plaintiff. (*Rosekrans* agt. *White*, 7 *Lans.*, 486.)

10. An objection that she is made defendant, and not a co-plaintiff, with her husband, could not avail other defendants in the action. (*Id.*)

PARTNERSHIP.

1. All actions brought in respect of any contract entered into by or on behalf of a *copartnership firm*, before the death of a partner, must be brought by or against the surviving members of the firm alone. The representatives of the deceased partner cannot sue or be sued in respect of such contract. (*Carriere* agt. *Spofford*, ante, 294.)

2. Not only the remedies but the rights and liabilities of the partnership vest in and are imposed upon the *surviving partner*. (*Id.*)

3. The joint debt may, by reason of the death of a partner, be treated as if originally a separate debt of the *surviving partner*. (*Id.*)

PLEDGE.

1. Where, on a pledge of property for a certain sum of money borrowed, it is agreed by the pledgor to pay a certain sum as a bonus for the use of the money, a tender of the principal sum with the amount of the bonus, without interest, is a sufficient tender to redeem. In the absence of any agreement to pay interest, the amount of the bonus must be considered to be in lieu thereof. (*Hines* agt. *Strong*, ante, 97.)

PLEADING.

1. An answer in foreclosure, alleging the invalidity of the mortgages in suit, and title to the premises under a subsequent mortgage, is not a counter-claim, but an equitable defense. (*Caryl* agt. *Williams*, 7 *Lans.*, 416.)

2. An answer in an action to foreclose a mortgage, that it is of no binding effect and no lien upon the premises described in the complaint, is a statement of a conclusion unsupported by facts, and unavailing. (*Id.*)

3. In an action where fraud is the basis of the complaint a recovery cannot be had for a breach of contract. (*Ross* agt. *Mather*, 51 *N. Y. R.*, 108.)

4. Plaintiff's complaint alleged in substance that defendant having offered to sell him a horse which was lame, warranted and falsely represented that the lameness was in the foot only, resulting from an injury while in pasture, and was of a temporary character; that relying upon said warranty and representations, he purchased; that the horse was in fact lame from a diseased gambrel joint, which defendant well knew. Plaintiff proved a warranty and breach thereof, but gave no evi-

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dence tending to show fraud. *Held* (Lott, Ch. C., dissenting), that the gravamen of the action was fraud, not a breach of warranty, and plaintiff could not recover upon proof of the latter only. (*Id.*)

5. In an action upon a contract executed by a married woman, it is not necessary to allege in the complaint that the contract was executed in her business, or for the benefit of her separate estate, nor is it necessary to ask judgment charging her separate estate, but the complaint may be framed as if defendant was a *feme sole*; and if coverture is interposed as a defense, testimony proving the contract to be enforceable against a *feme covert* is proper in reply. (*Hier* agt. *Staples*, 51 *N. Y. R.*, 136.)
6. An objection to the joinder of a maker and a guarantor of a promissory note, as parties defendant, is waived by an omission to raise it by demurrer or answer, and cannot be raised upon the trial, and a several judgment may be rendered against either. (*Id.*)
7. Where a complaint in an action to recover moneys had and received by defendants for plaintiff's use sets forth a cause of action which entitles plaintiff to a judgment, without regard to the character or nature of defendant's employment, allegations therein showing that such employment was of a fiduciary character, are not issuable, and where no order of arrest has been issued, a direction in the judgment in such action authorizing its enforcement by execution against the person of defendant is error. (*Prouty* agt. *Swift*, 51 *N. Y. R.*, 594.)
8. The pleadings relate to the time of the commencement of the action. Evidence of facts transpiring, or of a defense, in whole or in part, occurring, after the commence-

ment of an action, and issue joined therein, can only be received upon and in support of, a supplemental answer, put in by leave of the court. (*Hall* agt. *Olney*, 65 *Barb.*, 27.)

9. Proof of payment to the sheriff, after the commencement of an action for the recovery of a debt, and issue joined therein, of a part of such debt, by the defendant therein, under section 293 of the Code, and of the application thereof upon an execution in his hands, issued against the plaintiff, is simply proof of payment, and should be pleaded. (*Id.*)
10. In an action by a town, to compel the surrender and cancellation of bonds purporting to have been issued by it, the defendants insisted that the want of notice of any defect in the bonds, and the existence of good faith in the purchase, having been set up in the answer, and in response to the allegations in the complaint, and no proof having been given on the subject, the answer must be taken as true, and the defendants must be treated as *bona fide* holders without notice. *Held*, that this rule of equity pleading could not be applied, under the Code. (*The Town of Venice* agt. *Breed*, 65 *Barb.*, 597.)
11. Since the Code, the allegations in the answer are to be treated either as a denial of the allegations of the complaint, or as matter of affirmative defense. If the allegation in the complaint is not proved, the defendant gets the benefit of the denial by forcing the plaintiff to attempt proof of the fact alleged; and if it is not made, the defendant has the right to claim that his allegation is established. When the answer sets up matter by way of affirmative defense, he must prove it, or he gets no benefit from it. (*Id.*)
12. The Code does not authorize a recovery when the complaint al-

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leges facts showing a cause of action in tort by proving upon the trial the cause of action in contract. (*Degravo* agt. *Elmore*, 50 *N. Y. R.*, 1.)

13. Where, in an action upon a promissory note, the answer alleges facts sufficient to constitute a defense for want of consideration or for a recoupment of damages, it is not necessary for defendant to state which he will rely upon; and if he so states, he will not be precluded from insisting upon any defense which the facts alleged will justify. It is the facts alleged which constitute the defense, and whether or not it is called by the right name is immaterial. (*Springer* agt. *Dwyer*, 50 *N. Y. R.*, 19.)

POLICE JUSTICES, NEW YORK.

1. The convention or board of police justices of New York, organized under the act of 1860, in appointing and removing clerks, does not act as a court to be restrained, nor their proceedings reviewed by writ of prohibition. (*Matter of Dowling*, ante, 7.)

PRACTICE.

1. Upon the trial by a jury of issues settled in an equity action, the court has no authority to nonsuit plaintiff. The jury must find upon the issues, and their finding must be presented to the court upon the final hearing. If proof is necessary to establish facts not admitted in the pleadings or found by the jury, such proof must then be given. The court using the findings of the jury for its information, finds the facts and decides the law substantially as if all the issues had been regularly tried before it, and exceptions may be taken in the same manner as if

the case had been so tried, and findings not thus excepted to, cannot be questioned upon appeal to this court. (*Birdsall* agt. *Patterson*, 51 *N. Y. R.*, 43.)

2. Where evidence has been properly received, the party against whom it has been introduced, has no absolute right to have it stricken out when its effect has been destroyed by other evidence. The proper practice upon a jury trial is for such party to request the court to charge that such evidence is not to be considered by them, and in case of refusal he will have a good exception. (*Gawtry* agt. *Doane*, 51 *N. Y. R.*, 84.)
3. Questions relating to matters of practice, affecting the regularity of such proceedings, cannot be reviewed collaterally in another action. (*Van Deusen* agt. *Sweet*, 51 *N. Y. R.*, 378.)
4. An order, vacating an order of discontinuance without costs unless the plaintiff shall pay the defendant's attorney's costs, entered *pendente lite* on the stipulation of the plaintiff, his attorney, and the defendant, who was insolvent, after notice from defendant's attorney forbidding discontinuance without payment of his costs,—*Held*, to be proper relief on motion and affirmed. (*Wormer* agt. *Canovan* 7 *Lans.*, 36.)

5. Except as between the parties to an action, it is discontinued only upon entry of the order therefor. (*Id.*)
6. Notice of claim for costs before entry of the order is in time, no value having been paid for stipulating to discontinue. (*Id.*)
7. Supreme court rule 40, which provides that neither party, where a feigned issue has been tried, shall question the ruling at the final hearing or subsequently, unless he has moved for a new trial,

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- does not preclude the court, where the case is brought on for final hearing, from rejecting the verdict and ordering a new trial *ex mero motu*, or from deciding the question of fact for itself. (*Brown* agt. *Clifford*, 7 *Lans.*, 46.)
8. And the court may, likewise, accept the verdict upon the facts found. (*Id.*)
9. Questions of law decided on appeal from a verdict rendered on a feigned issue, are *res judicata* in the action. (*Id.*)
10. Where, in an action alleging that by agreement at the execution and delivery of an absolute deed it was taken as mere security, a feigned issue, presenting the question whether the deed was made and executed as security, was tried, and the jury found affirmatively,—*Held*, that the finding was substantially that the agreement averred in the complaint had been made. (*Id.*)
11. An objection does not lie on appeal because a judgment gives the relief intended more minutely than specified in the decision, if the relief is not enlarged. (*Applegate* agt. *Morse*, 7 *Lans.*, 59.)
12. Reversal by the general term of an order denying a motion in the county court to set aside proceedings does not, without an order to that effect, set them aside. (*Miller* agt. *Adams* 7 *Lans.*, 131.)
13. No request having been made on the trial to submit a controverted fact to the jury, it becomes the province of the court to determine the fact, and its decision is final. (*Excelsior Fire Insurance Co.* agt. *Royal Ins. Co.*, 7 *Lans.*, 138.)
14. Where a charge to the jury considers the testimony only on one side, and the counsel for the other side objects, without requesting a charge upon the remaining testimony, he has no benefit from the exception. (*Magovern* agt. *Staple*, 7 *Lans.*, 219.)
15. Where an action is brought in equity and the demand is for purely equitable relief, the trial of questions of fact by the court is in its discretion. (*Rexford* agt. *Marquis*, 7 *Lans.*, 249.)
16. A defendant has no absolute right to a preliminary order settling issues in an action for equitable relief to be tried by a jury. A refusal to grant such an order does not necessarily deprive the defendant of his right to such trial. If he has that right, and the cause is brought to trial before the court without a jury, the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury. If the court refuse so to do, defendant's remedy is by appeal from judgment. (*Colman* agt. *Dixon*, 50 *N. Y. R.*, 572.)
17. Where, upon appeal to this court, from an order granting a new trial in an equity case, the order is affirmed and judgment absolute ordered against appellant "without costs to either party," this disposes of all the costs in the action, and an insertion by respondent of costs in the judgment entered upon the remittitur is irregular. (*Patten* agt. *Stitt*, 50 *N. Y. R.*, 591.)
18. A motion to correct the judgment is the proper remedy. Whether an appeal from the judgment is proper in such case, *quere*. (*Id.*)
19. A judgment should not be set aside on account of an improper taxation of costs, or a taxation without notice. A readjustment should be ordered, and the amount of reduction, if any, be deducted from the judgment. (*Watson* agt. *Gardiner* [Mem.], 50 *N. Y. R.*, 671.)
20. There is no authority, in law, for the taking of exceptions, except upon the decision of questions of

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- law; excepting, also, the exceptions to the findings of the judge or referee upon the law contained in his report, in the decision of a cause, taken within ten days after notice of the judgment, pursuant to section 268 of the Code; and excepting, also, that class of exceptions required or allowed by the former practice in equity to the reports of masters in chancery, in taking and stating accounts, and otherwise. (*Carroll agt. The Staten Island Railroad Co.*, 65 Barb., 32.)
21. If a party desires to have questions of fact passed upon by the referee, so as to present questions of law upon the finding or refusal to find in accordance therewith, upon which he can base exceptions, he should make such request to the referee before the submission of the cause to him; and then, if the referee does not comply with such request, the party can except to his finding or refusal to find or decide as requested, within ten days after notice of the judgment. (*Id.*)
22. Such exceptions will then have the same force as the like exceptions to the refusal of a judge, at the circuit, to charge as requested. (*Id.*)
23. But when the referee has omitted, in his report, to make such findings as will give force or point to the exceptions, the party may still, after notice of the judgment, and while the right to take exceptions to the findings of the referee in his report remains, apply to the court to send the case back to the referee, to pass specifically upon such questions, or to resettle his report. (*Id.*)
24. In such case, the entry of judgment should be stayed, or the time to except extended, until the application is disposed of. (*Id.*)
25. The provision, in rule 41, that "the judge or referee shall, at the time of settling the case or exceptions, find on such other questions of fact as may be required by either party and may be material to the issue," relates to questions of fact, only; and this rule, as well as the proviso in section 268 of the Code, that the judge, in settling the case, "shall briefly specify the facts found by him, and his conclusions of law," are simply directory, and do not authorize the judge or referee to insert in the case new exceptions, or exceptions not in fact taken, when the judge could not accede to the request. (*Id.*)
26. It seems that this proviso in section 268, inserted therein in 1851, was virtually repealed by the provision inserted in section 267, in 1860, directing that "the decision of a judge shall be in writing, and shall contain a statement of the facts found, and conclusions of law separately," precisely as is required of referees by section 270 as amended in 1857. (*Id.*)
27. This provision is imperative, and compliance with it is essential to the regularity of a report, either by a judge or referee. (*Id.*)
28. Where, upon the settlement of a case, before a referee, the defendant's counsel requested the referee to find, in respect to a large number of specified questions of fact, and upon the refusal of the referee to do so, the counsel excepted, and such requests and exceptions were contained in the case; held, that such exceptions were of no validity and were not properly before the court, on appeal from the judgment. (*Id.*)
29. A decision, on the trial of a question of fact by the court, which does not authorize a final judgment, but directs further proceedings before a referee, or otherwise, is precisely the decision described in section 268 of the Code.

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- as amended in 1867, authorizing a party to move for a new trial, upon a case or exceptions. (*Stanton* agt. *Miller*, 65 Barb., 58.)
30. The facts found by a judge, and incorporated in the record of judgment, must stand as the findings in the case, and neither a judge nor a referee can find facts contradictory thereto. (*Pendleton* agt. *Hughes*, 65 Barb., 136.)
31. If such findings are erroneous, application must be made to the court to send them back for correction. (*Id.*)
32. The only findings that a judge or referee can make, at the time of settling the case or exceptions, are findings *in addition* to those previously found, and not in contradiction thereof. (*Id.*)
33. There is nothing in the provisions of the Revised Statutes relating to a discovery of books and papers, that authorizes the insertion, in the order, of the consequences of not obeying it. (*Rice* agt. *Ehle*, 65 Barb., 185.)
34. But rule 16 of the supreme court (now rule 20) provides that the order shall declare the consequences of an omission to comply with the same; and although there is no authority in the provisions of the Code relating to discovery, for inserting that provision in the rule, yet the insertion of such a clause in an order for discovery cannot effect its validity; the clause being entirely harmless. (*Id.*)
35. If the insertion of such a provision, in an order for discovery, could effect its validity, rule 20 is confirmed and legalized by section 13 of chapter 408 of the Laws of 1870. (*Id.*)
36. Parties who have procured the insertion in an order, of a provision giving leave to apply to another judge for an order to show cause why such order has not been complied with, cannot be heard to complain of it afterward. (*Id.*)
37. Where the defendant, in an action for libel, dies, before final judgment, the plaintiff is not entitled to an order continuing the action against the executor of the deceased defendant, for the reason that the cause of action does not survive or continue. (*More* agt. *Bennett*, 65 Barb., 338.)
38. An instruction by the court in its charge to the jury to disregard evidence on the trial, is equivalent to striking out. And when it appears that notwithstanding such an instruction, or when evidence is stricken out on motion, it appears that it may have operated upon the minds of the jury, the verdict ought to be set aside. To hold that it must be made to appear that it did influence the jury would be, in many cases, to require an impossibility. The presumption should be that the jury acted only upon the legal evidence submitted to them, and not upon that which they have been told not to regard, or which has been stricken from the case. (*Garfield* agt. *Kirk*, 65 Barb., 464.)
39. Exceptions to findings of fact are not authorized, nor even contemplated by the Code. The exceptions must be to the conclusions of law only. (*Id.*)
40. Although remarks were made by the judge, in his charge to the jury, that, standing alone, could not be approved; yet, if the general bearing and scope of the charge was right, and the erroneous remarks did not do any injury to the unsuccessful party, the court will not set aside the verdict for that cause. (*Shrader* agt. *Bonker*, 65 Barb., 608.)

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41. A mistake of the court, in placing the admission of evidence on an untenable ground, is not sufficient reason for reversing the judgment. (*Bassil* agt. *Elmore*, 65 *Barb.*, 627.)

PRINCIPAL AND AGENT.

1. *It seems*, that where the plaintiff has fully ratified a settlement and discharge made by his agent of a claim against another, in favor of the plaintiff, the debtor is discharged therefrom and the plaintiff is bound, whether the agent had authority to make such settlement and discharge or not. (*Graham* agt. *Selover*, *ante*, 107.)

PROBATE OF WILL.

1. Service of citations to probate of a will before the surrogate by a party interested, is legal and valid. (*Wetmore* agt. *Parker*, 7 *Lans.*, 121.)

PROMISSORY NOTES.

1. The defense that a note was obtained by unlawful duress is available to the surety, who united in executing it. (*Ingersoll* agt. *Roe*, 65 *Barb.*, 346.)
2. A written instrument which reads as follows is, in substance, a promissory note, to wit:
 "\$12,000.
 "SAN FRANCISCO, February 2, 1865.
 "On demand, at 3 o'clock P. M. of of that day (no grace), for value received in legal tender notes issued by the government of the United States, I, George N. Ferguson, promise to pay Alexander Gamble, or order, \$12,000, with interest from date at the rate of two per cent per month until paid, payable monthly; both principal and interest payable in the legal

tender notes issued by the government of the United States.

[U. S. Int. Rev. Stamp.]

G. N. FERGUSON."

(*Kelly* agt. *Ferguson*, *ante*, 411.)

3. *Held*, that the instrument sued on was a promissory note, and that, as such, it was negotiable and transferable by indorsement. Also *held*, that the plaintiffs were not to be regarded as having any better rights on this paper than the payee, because they took it after maturity and as collateral security merely for a prior indebtedness, and therefore, took it subject to the same defenses which defendant might have set up against Gamble, if the action had been brought by him. (*Id.*)

4. But the uncontradicted testimony of the defendant showed that Gamble himself had taken the note as collateral security merely, for the repayment of a loan. This was competent, and received without objection. Any instrument, although absolute on its face, may be shown, by parol, to be a security only. The plaintiffs, therefore, could not rightfully recover anything beyond the extent of Gamble's interest, which amounted to the sum of \$6,000 in gold, and interest. (*Id.*)

PUBLIC OFFICES.

1. It is an old and well settled principle that no person can hold incompatible offices. (*People* agt. *Green*, *ante*, 169.)
2. Offices are said to be incompatible and inconsistent so as to be executed by the same person: 1st. When, from the multiplicity of business in them, they cannot be executed with care and ability; or, 2d. When, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty. (*Id.*)

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3. It has been invariably held that the incumbent of two offices which bore no relation subordinating one to the other were not incompatible. (*Id.*)

4. The *relator*, by accepting the office of *member of assembly*, did not thereby vacate his office of *deputy clerk of the special sessions*; the two offices were not incompatible. (*Id.*)

5. A *mandamus* to compel the comptroller to pay the *relator's* salary during the months he acted as member of assembly, ordered. (*Id.*)

Q.

QUESTIONS OF LAW AND FACT.

1. Where the terms of a contract are undisputed, the question as to the nature, extent and effect thereof, and of the interest of the parties thereto, is to be determined by the contract, and is a question of law for the court. (*Groat agt. Gile, 51 N. Y. R., 431.*)

R.

RAILROADS.

See INJUNCTION.

Dinsmore agt. Atlantic and Pacific R. R. Co., ante, 193.

REAL ESTATE BROKERS.

1. Real estate brokers, employed as middle-men, to bring purchasers together to enable them to make their own bargain, may charge commissions to both parties. (*Siegel agt. Gould, 7 Lans., 177.*)

2. They are not agents to buy and sell, and not within the rule which prohibits their acting without consent as agent for both buyer and seller. (*Id.*)

RECEIPT.

1. A receipt for money, though it be stated to be in full of the debt or demand upon which it is received, may be contradicted or explained by parol evidence. (*Howard agt. Norton, 65 Barb., 161.*)

2. A receipt for the note of a third person is explainable, unless it be stated in it that it is received in full payment of the debt or demand on which it is to be applied. (*Id.*)

RECEIVER.

1. An assignment running in the name of J. P., receiver, &c., and signed "J. P., receiver," contained a covenant that the assigned claims were due and unpaid. *Held*, that J. P.'s intention was to covenant officially, not individually. (*Livingston agt. Pettigrew, 7 Lans., 405.*)

2. Otherwise the intent to make a personal covenant should have been expressed. (*Id.*)

REDEMPTION.

See SUMMARY PROCEEDINGS.

Crawford agt. Waters, ante, 210.

1. The redemption of land, by a judgment debtor, sold on execution against him, is governed by the statute. (2 R. S. [Edm. ed.], 384, § 46.) (*Ellsworth agt. Muldoon, ante, 246.*)

2. And it is no valid objection to such redemption that the judgment debtor had, subsequent to the sale, conveyed the premises to a receiver, appointed for the benefit of his creditors. Such a conveyance, in its nature, creates a trust for creditors. Subject to the execution of the trust the reversion

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belongs to the execution debtor, and he has sufficient interest to redeem. (*Id.*)

3. The statute gives the right of redemption to an execution debtor, irrespective of the situation of the title. (*The decision in Husted agt. Dakin, 17 Abb., 137, disapproved.*) (*Id.*)

4. A sale of land under an execution is not conclusive against the execution debtor before the expiration of one year from the sale. (2 R. S., 370.) (*Id.*)

See CHATTEL MORTGAGE.
Halstead agt. Swartz, ante, 289.

5. Proof was made in ejectment that an affidavit on a creditor's redemption of real estate from execution sale was presented to the sheriff, of search in the county, clerk's office for the redemption papers, where they were not found, and of the probable destruction of such papers. *Held*, there being no distinct objection to the sufficiency of the search, that a copy of the affidavit was properly received in evidence. (*Rice agt. Davis, 7 Lans., 393.*)

6. The redemption is not invalid, at least as respects the debtor, if one of several judgments, under which the creditor purports to have redeemed is properly certified to the sheriff. (*Id.*)

7. And an affidavit proceedings upon all the judgments, but stating the amount due on each, is sufficient to support redemption under the one judgment properly certified. (*Id.*)

8. And to redeem from the redeeming creditor, the judgments improperly authenticated would not be entitled to payment. (*Id.*)

9. An affidavit that the affiant "is the person to whom the above several described judgments are

assigned, and that the same are true copies of the original assignments of such judgments," that he "carefully compared them with such original assignments, and that they are true copies of such original assignments," proved by copy, the original being lost,—*Held*, a substantial compliance with the statute. (*Id.*)

10. The sheriff's certificate of redemption is *prima facie* evidence of the facts stated in it. (*Id.*)

11. The regularity of the proceedings to redeem may be presumed from recitals in the sheriff's deed. (*Id.*)

12. An original sheriff's certificate of redemption, proved by copy on the trial as lost, may be used as evidence upon appeal. (*Id.*)

13. A redemption not made "on or after the last day of the fifteen months" held valid, although not made "in the county in which the sale took place." (*Id.*)

14. The homestead exemption act does not affect the rights of creditors to redeem from execution sales made under judgments docketed prior to the record of the notice of exemption. (*Id.*)

REFEREES.

1. A referee has power to give judgment for the plaintiff upon the pleadings where the answer does not contain facts constituting a defense. (*Schuyler agt. Smith, 51 N. Y. R., 309.*)

2. Where it appeared that while a case was pending before a referee, who was a practicing attorney, the plaintiff employed him to prosecute and collect two several demands against other parties, on one of which he brought an action and the other remained in his

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hands, unprosecuted, at the time he made his report, which was in favor of the plaintiff; *held*, that without inquiring whether the decision of the referee was or was not affected favorably to the plaintiff by his retainer in such other matters, the rule should be inflexible that such a retainer by a party would, *ipso facto*, avoid the report of a referee. (*Stebbins* agt. *Brown*, 65 *Barb.*, 272.)

3. When evidence, offered before a referee is objected to, he should decide the question as to its admissibility, at the time the evidence is offered. He cannot reserve that question and decide it on the final disposition of the cause. (*Wagner* agt. *Finch*, 65 *Barb.*, 493.)

4. The parties are entitled to have such questions passed upon at the time they are raised, so that they can govern themselves in the further trial of the cause, in the light of and in reference to such decision. (*Id.*)

RELIGIOUS CORPORATIONS.

See TITLE.

Alex'r Presbyterian Ch. agt. *Presbyterian Ch.*, 5th *Av.*, ante, 312.

S.

SALE.

1. Where objections are made to the title of real estate in consequence of certain defects in the proceedings, and on reference they are found to be well taken, and it is impossible to cure them, the sale should be rescinded and the purchaser reimbursed. (*Parisen* agt. *Parisen*, ante, 385.)

2. In an action to set aside a mortgage sale upon the ground of fraud in the manner of making the sale, a *demurrer* to the complaint, inter-

posed upon the ground that the complaint contains no allegation that the plaintiffs tendered back the money realized upon the foreclosure sale, cannot be sustained. (*Dusenbury* agt. *Dusenbury*, ante, 417.)

3. When sale has been made under judgment recovered in foreclosure proceedings, it will not be set aside if the mover has been guilty of any laches. (*Depew* agt. *Dewey*, ante, 441.)

4. If the period prescribed by statute within which an action in equity to redeem a mortgage can be brought has expired, the court has no power to set such sale aside. (*Id.*)

SALE AND DELIVERY.

1. In an action for alleged breach of contract in defendants refusing to receive and pay for certain goods which the plaintiffs contracted to sell to them, subsequently to arrive in a designated vessel, in order to recover it is necessary for the plaintiffs to show the delivery or a readiness and offer to deliver the whole quantity of goods. (*Newberry* agt. *Furnival*, ante, 139.)

2. Where a *part* of the goods arrive, if the defendants, knowing this fact, accept it, this probably will be a waiver, or if they make no objections to a delivery of the whole at that time, but affirmatively refuse to receive them on some other ground, this probably would constitute a waiver of delivery of the whole. (*Id.*)

SATISFACTION OF JUDGMENT.

1. Where the judgment creditor and the judgment debtor in the judgment, agreed upon a compromise

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of settlement of the judgment, and that the judgment was agreed to be satisfied on certain specific terms and conditions, and the defendant, instead of complying with the terms of the settlement, wrongfully, if not fraudulently, obtained a satisfaction-piece, prepared and executed by the plaintiff, and deposited by him with a third party to be delivered on defendant's complying with said terms and conditions of settlement, and filed and entered such satisfaction-piece, and procured a discharge of the judgment. (*Slocum* agt. *Freeman*, ante, 487.)

2. Held, that the plaintiff was entitled to have the satisfaction-piece canceled and the lien of the judgment restored. (*Id.*)

SATISFACTION OF MORTGAGE.

1. A resident acting trustee, his co-trustee having been absent abroad for a number of years, may receive payment of a mortgage and sign and acknowledge a satisfaction-piece thereof. And a mandamus will issue requiring the register to receive and file the satisfaction-piece and discharge the mortgage. (*People* agt. *Sigel*, ante, 151.)

SERVICE.

1. The service of summons by publication in an action for foreclosure under the provisions of subdivision 6 of section 135 of the Code, which provides for service upon unknown parties having interest in the mortgaged premises, is valid and binding, although it appears that the unknown party is an infant. (*Wheeler* agt. *Scully* [Mem.], 50 N. Y. R., 667.)

SHERIFF.

See ATTACHMENT.

O'Brien agt. *Mechanics' and Traders' Fire Ins. Co.*, ante, 429.

Moses agt. *Waterbury Button Co.*, ante, 528.

1. The sheriff is not entitled to any other fees than those expressly allowed by statute. (*Crofoot* agt. *Brandt*, ante, 481.)
2. Where a judgment is recovered in the marine court, and a transcript filed with the county clerk, such judgment becomes a judgment of this court, and, on an execution issued thereon, the sheriff is entitled to the same fees as if the judgment was recovered therein. (*Id.*)
3. If the execution had issued on the judgment in the marine court, no greater poundage could be claimed. (*Per J. F. DALY, J.*) (*Id.*)
4. Fees on execution, poundage, &c., stated. (*Id.*)
5. In an action to charge a sheriff, upon a recovery by the plaintiff as defendant in *replevin*, the complaint averring that the sureties failed to justify and no new sureties were furnished (Code § 210), and "that the defendant became liable therefor," no denial of the averment being made and no question of liability by reason of the failure of the sureties to justify raised below, it seems the defendant's liability on that ground is conceded. (*Hofheimer* agt. *Campbell*, 7 *Lans.*, 157.)
6. If the sureties turn out insufficient, the sheriff is liable under section 210 of the Code, in like manner as they are. (*Id.*)
7. Failure of the sureties to justify is satisfactory evidence in an action against the sheriff that they were

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not qualified, and notwithstanding their affidavit to the contrary attached to the undertaking. (*Id.*)

8. An agreement to discharge the sheriff from liability for non-justification of the sureties, upon his delivery to the defendant of the property replevined, is illegal and void. (*Id.*)

9. Neglect of the sheriff to return the execution does not affect rights acquired by purchasers at a sale regularly made under it. (*Phillips agt. Schiffer*, 7 *Lans.*, 347.)

10. An attorney issuing an execution is liable to the sheriff for his poundage thereon. *Campbell agt. Cothren*, 65 *Barb.*, 534.)

SLANDER.

1. In an action for slander in uttering words not actionable, *per se*, the plaintiff, in order to recover, must allege and prove special damages, and the special damages must be particularly stated in the complaint. (*Bassett agt. Elmore*, 65 *Barb.*, 627.)

2. An allegation in the complaint that the false and slanderous statements of the defendant greatly injured the plaintiff, and caused her relations to slight and shun her, does not specify any pecuniary injury for which a recovery can be had. (*Id.*)

3. Where a complaint contains but one valid count, only one slanderous charge can be proved. Evidence to prove another conversation, in which other and different words from those alleged in the complaint were used, is inadmissible. (*Id.*)

4. But when the plaintiff does not go beyond the words laid in the complaint, he may show that those words were spoken on several

different occasions, although there may be but one count in the complaint. (*Id.*)

5. Where the special damage alleged was that the plaintiff was, by reason of the slander, turned away from her uncle's house, where she resided; *held*, that if this was the natural and immediate consequence of the slander, it was such pecuniary damage as would sustain the action. (*Id.*)

6. *Held, also*, that it was for the jury to say whether the plaintiff was turned away from her uncle's on account of the slander; and that that question having been properly submitted to them, and they having found for the plaintiff, the court could not disturb the verdict. (*Id.*)

SPECIAL TERMS.

1. Although *special terms* are required to be held in the several counties, their jurisdiction is not limited to cases arising in the county or even the judicial district in which they are held. They have jurisdiction to hear and decide motions from any part of the state. (*Rice agt. Ehle, ante*, 153.)

2. It is competent for counsel to agree to have a motion heard and decided at any special term in any county in the state, and the order made in it is reviewable, when made, in a county other than that designated by the Code, as if it were made in the proper county. (*Id.*)

• SPECIFIC PERFORMANCE.

1. A bill in equity for the specific performance of a contract is an application to the sound judgment of the court. (*Burling agt. King, ante*, 452.)

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2. The court will require, as ground for granting relief in the premises, that the agreement sought to be enforced shall be certain in its terms, mutual in its character, fair and just, founded on an adequate consideration, and be in its nature and circumstances unobjectionable to a court of equity. (*Id.*)

STATE COURTS.

1. An action by an assignee in bankruptcy, to set aside a conveyance made by the bankrupt, as a fraud on the bankrupt act, is an action to enforce the law, of which a state court has no jurisdiction. (*Gilbert* agt. *Priest*, 65 *Barb.*, 444.)

STATUTES OF LIMITATION.

1. In the case of fraud clearly established, a court of equity is not barred by lapse of time from granting relief where the cause of action arose before the Revised Statutes. (*Prindle* agt. *Beveridge*, 7 *Lans.*, 225.)
2. Statutes of limitations contained in the Revised Statutes do not apply to causes of action or defenses accruing before their passage. (*Id.*)
3. It seems that, except as provided by subdivision 6, § 91, of the Code, actions for specific relief in equity are to be brought within ten years. (*Salisbury* agt. *Morss*, 7 *Lans.*, 359.)
4. Under section 101 of the Code, before 1870, when the exception for the benefit of married women was stricken out by amendment, their disability under the statute of limitations was not continued after death in behalf of their estate. (*Dunham* agt. *Sage*, 7 *Lans.*, 419.)
5. The failure of an appointment of executors upon an estate does not

save the running of the statute of limitation. (*Id.*)

SUMMONS.

1. An action to recover a statute penalty is not an action upon a contract within the meaning of section 129 of the Code, and the summons in such an action should be in the form prescribed by the second subdivision of that section. (*McCoun* agt. *N. Y. C. R. R. Co.*, 50 *N. Y. R.*, 176.)
2. An action to recover a penalty given by statute is an action on contract, within the meaning of section 129 of the Code, and the summons should be in the form prescribed by subdivision 1 of that section. (*McCabe* agt. *N. Y. C. & Hudson R. R. Co.*, 7 *Lans.*, 75.)

STOCKHOLDERS.

1. When a joint-stock operation has been adjusted by the distribution of stock *pro rata*, according to the interest paid for by the parties, said adjustment cannot be disturbed at the instance of one of the stockholders. (*Boody* agt. *Drew*, *ante*, 459.)
2. Managers appointed in pursuance of a jointure of interests, to conduct the affairs of the parties joined, are liable for neglect or fraud, but the stockholders stand to each other in the relation of co-owners of the property managed, and cannot be made liable for the acts of their managers. (*Id.*)

STREETS.

1. Where a written contract is entered into by the contractor with

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the mayor, &c., for regulating and grading a street, which contains the specification of the work to be done and the price to be paid, not including *slopes* in excavation of *rock* outside of the perpendicular line of the street, but provides "that in case any other work is required to be done in order to carry out the provisions of this agreement, which is not called for in the specification, that he will go on and do the same without any claim for extra compensation therefor," the contractor cannot recover extra compensation for such slopes in excavation of rock. (*Voorhis* agt. *Mayor, &c., N. Y., ante*, 116.)

2. 1st. Because the contract does not call for this work; and, 2d. If the contractor finds it easier or necessary to do it, in fulfilling what the contract does call for, then it falls within the above provision for other work to be done without extra compensation. (*Id.*)
3. It is competent for the parties to such a contract to make it an exception to the usual contracts of this kind; and whenever this is done, the terms of the contract must prevail. Custom or usage cannot be set up against it, there being nothing ambiguous in it, nor any intention respecting it which custom or usage should supply. (*Id.*)

SUMMARY PROCEEDINGS.

1. In order to entitle a lessee, mortgagee or judgment creditor to *redeem* after the landlord has recovered possession of the demised premises under a warrant of disposssession in summary proceedings under the statute, a payment must be made to the landlord equal to all the rent in arrear at that time, and all costs and charges incurred by the landlord. Short of this no redemption of the forfeited

possession can be effected. (*Crawford* agt. *Waters, ante*, 210.)

2. The statute does not provide that such required payment shall be reduced by so much as the landlord may have received for rents or other income or benefit, during the period of the landlord's possession, subsequent to the execution of the warrant. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. A plaintiff's attorney received money on an *ex parte* order, in proceedings supplementary, from one owing the judgment debtor, having knowledge of a claim for the same money, and of a suit pending thereon against the person upon whom the order was made, but without disclosing these facts to the judge; the person owing had been examined and admitted the indebtedness, and the judgment debtor swore that he had owed, not that he did owe him. Judgment was recovered by the claimant, and the defendants moved against the attorney for repayment. *Held*, on appeal, that the motion was rightly granted. (*Fowler* agt. *Louenstein, 7 Lans., 167.*)
2. *Held, also*, that the suppression of the facts as mentioned was an imposition upon the justice who granted the order, and that restitution was proper on that ground, and, against an attorney, would be enforced by attachment. (*Id.*)
3. The attorney having stated that he had paid over the moneys to the plaintiffs in his action, he being himself one of them,—*Held*, that it was no defense. (*Id.*)
4. Nor was it a defense that the proceedings were taken for the benefit of plaintiff's assignee, no

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claim of payment to the assignee being made. (*Id.*)

T.

TAXES AND ASSESSMENTS.

1. The commissioners of taxes and assessments in the city of New York, in estimating the value of the *capital stock of the city railroad corporations*, should deduct from the *actual value* of such stock: 1. The assessed value of its real estate. 2. The value of United States stock owned by it. 3. The value of stock in other corporations owned by it. (*People agt. Commissioners of Taxes, &c., ante, 227.*)
2. After these deductions are made the provisions of the statutes directing special deductions are complied with, and it becomes the duty of the commissioners to return the balance of the value of the capital stock, subject to assessment. (*Id.*)
3. The *mode* by which the commissioners are to arrive at the *actual value* of the capital stock is not pointed out in the statutes, and the same must be left to the discretion of the commissioners; but they may not disregard any legal rules, and adopt principles erroneous in law, and where they do that their action in fixing such value is subject to review. Beyond that the court will not interfere with such valuation. (*Id.*)
4. In ascertaining such value the commissioners cannot disregard the fact of *indebtedness*. It enters as much into the value of the stock as it does in the assessment of the personal estate of an individual. The capital stock should be valued at what it is actually worth. In ascertaining such value the amount of the indebtedness of the company must enter into the estimate. (*Id.*)

5. After making due allowance for the indebtedness of the corporation as diminishing the value of its capital stock, then the estimate of the commissioners will be *conclusive*, and with it the court should not interfere, as no further deduction of its valuation can be legally made. (*Id.*)

6. In ascertaining the value of the *capital stock* of a corporation for the purpose of *taxation*, the commissioners of taxes and assessments, where there is no sworn evidence before them, are justified in ascertaining such value from other sources, as they do in valuing real estate. (*Pacific Steamship Co. agt. Comrs. Taxes, &c., ante, 315.*)
7. In addition to this it is equally the duty of the commissioners to consider the *indebtedness* of the corporation as reducing the actual value of the stock, and form their estimate on that basis. (*Id.*)
8. All *personal property* belonging to a corporation permanently located *out of this state* is exempt from taxation here. Such property, therefore, is not to be valued as part of the capital stock of the corporation. (*Id.*)

TENANTS IN COMMON.

1. There being no proof of conversion, and the court having charged the jury that the plaintiff, if they found for him, was entitled to interest from the time of conversion, —*Held*, that it was virtually a charge that there was evidence of conversion and error. (*Moore agt. Erie Railway Co., 7 Lans., 39.*)

TITLE.

1. Where a religious corporation, by means of subscriptions from its

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members principally, establish a mission school and chapel in another location, and purchase premises and erect buildings thereon, and continue such Sunday school and ministry in the chapel for a number of years, and the persons who statedly worship at said chapel become numerous and strong enough to be and are organized into a separate church corporation, under another title, with the consent of the original church, the new corporation does not thereby become vested with any rights in the premises they occupy to the exclusion of the original church. (*Alexander Presbyterian Church* agt. *Presbyterian Ch.* corner Fifth Ave., ante, 312.)

2. Neither can the original church be declared a trustee of such premises for the benefit of the new corporation; on the contrary, the rights and ownership of the former in the premises are unchanged, and they are authorized to close up such Sunday school and chapel whenever they think proper. (*Id.*)

See ATTORNEY.

Goodenough agt. *Spencer*, ante, 347.

See SALE.

Parisen agt. *Parisen*, ante, 385.

3. In an action brought by plaintiffs as executors to compel defendants to complete a contract to purchase a house and lot of plaintiffs, executors of the last will and testament of Thomas Kerr, deceased, which plaintiffs agreed to convey under the will, supposing in good faith that they had such power, and on the coming in of the report of the referee the judgment of the court was that the plaintiffs had no such power under the will to convey. (*McMulkin* agt. *Bates*, ante, 405.)

4. *Held*, that the defendant cannot now be remunerated for the improvements made by him upon

the premises. He should have made his examination of the plaintiffs' power and of the testator's title prior to such outlay. (*Id.*)

5. *Held*, that the defendant should be allowed, however, against the sum of \$180, found to be the rental value of the premises, while occupied by him, the taxes for 1868, 1869 and 1870 paid by him. The sum also of \$500 on account of the purchase-money and the interest paid on the balance of the several amounts of the purchase-money. (*Id.*)

TRADE-MARK.

1. It is undoubtedly well settled that the *name of the place* where an article is manufactured and the *word* which is descriptive of the article manufactured may be used by any tradesman who there makes and vends the article. (*Lea* agt. *Wolf*, ante, 157.)
2. But where the plaintiffs have a well known trade-mark, "Worcestershire Sauce," which is manufactured at Worcestershire, and has been for thirty years past, and the defendants manufactured an article at another place which they call "Worcestershire Sauce," and the imitation in colors, size, language and appearance of their labels and wrappers are irresistible proof of their intention to deceive the public and to lead purchasers to suppose that the defendants' preparation is the original made by plaintiffs, the defendants should not be protected in their fraudulent imitation by the pretense that in the words employed the name of a place and the word descriptive of the article only are used. (*Id.*)

TRIAL.

1. Where the appellate court has sent a case back for the trial of a

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single remaining question, which belongs to the jury, the special term will order the cause put upon circuit calendar, notwithstanding objections that other issues are involved and unsettled. (*Vose* agt. *Florida Railroad Co.*, ante, 424.)

See JOINT DEBTORS.

Saxton agt. *Dodge*, ante, 467.

2. In an action upon a contract executed by a married woman, it is not necessary to allege in the complaint that the contract was executed in her business, or for the benefit of her separate estate, nor is it necessary to ask judgment charging her separate estate, but the complaint may be framed as if defendant was a *feme sole*; and if coverture is interposed as a defense, testimony proving the contract to be enforceable against a *feme covert*, is proper in reply. (*Hier* agt. *Staples*, 51 N. Y. R., 136.)

3. An objection to a joinder of a maker and a guarantor of a promissory note, as parties defendant, is waived by an omission to raise it by demurrer or answer, and cannot be raised upon the trial, and a several judgment may be rendered against either. (*Id.*)

4. Upon a cause being moved for trial before a court without a jury, defendant objected that the question was one of fact and that he was entitled to a jury trial. The objection was overruled. *Held*, no error; that although the case may have been one entitling defendant to a jury trial, yet having based his objection upon an untenable ground, he must be confined to it. (*McKeon* agt. *See*, 51 N. Y. R., 300.)

5. At the close of the testimony defendant moved for a nonsuit upon the ground that he was entitled to a jury trial by article 1, sec. 2 of the state constitution, which motion was overruled. *Held*, no error; that it was not a ground for

a nonsuit, and it was then too late to raise the objection. (*Id.*)

6. It is not necessary that the record of proceedings of a court of limited jurisdiction should show affirmatively and on its face that the court had jurisdiction. The facts necessary to give jurisdiction may be shown by proof *aliunde*; and where, upon the introduction of the record in evidence upon a trial it is objected to, not upon the ground that jurisdiction was not established by proper proof, but upon the ground that the proceedings shown by the record are void, the objection is insufficient to raise the question of jurisdiction upon appeal. (*Van Deusen* agt. *Sweet*, 51 N. Y. R., 378.)

7. Where several propositions are contained in one request to charge, unless all are material and true in law and in fact, the court does not err in refusing to comply with the request. (*Palmer* agt. *Holland*, 51 N. Y. R., 416.)

8. The court, in an action for the conversion of a quantity of wool, instructed the jury to allow the highest market price of wool, from the time of demand to the time of trial, with interest from the time of demand. Defendant excepted to the charge as a whole. *Held*, that the portion of the charge allowing the highest market price was proper, and the exception was, therefore, too broad to present any question as to the residue. (*Groat* agt. *Gile*, 51 N. Y. R., 431.)

TRUSTEES.

1. A resident acting trustee, his co-trustee having been absent abroad for a number of years, may receive payment of a mortgage and sign and acknowledge a satisfaction-piece thereof. And a *mandamus* will issue requiring the register to receive and file the satisfaction-

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piece and discharge the mortgage. (*People* agt. *Sigel*, ante, 151.)

2. In actions for the *partition* of real estate the right of the plaintiff to be an *owner* should be clear to warrant the court to take the custody of the property out of the possession of those having an apparently valid title. (*Patterson* agt. *McCunn*, ante, 182.)

3. Where the executors and trustees are vested with that right under a will, while the claim of the plaintiff, as an heir-at-law, is doubtful and uncertain, her motion for an *injunction* and *receiver* pending her action for partition will be denied. (*Id.*)

4. Where application is made in such action to remove the trustees on the ground of incompetence or improvidence, upon affidavits founded in a great part on information and belief, which are unequivocally denied on behalf of the trustees, there is no propriety in granting the motion on such a state of the testimony, nor in trying such a question in the action on conflicting affidavits. (*Id.*)

V.

VENDOR AND PURCHASER.

1. Where a purchaser and vendor enter into a contract for the sale of real estate free from incumbrance, except as stated in the contract, and the purchaser makes a payment down of a part of the purchase-money, the remainder to be paid and adjusted at a future day appointed, when the deed is to be delivered, and on the tender of the deed by the vendor on the day specified the purchaser objects to accepting it on the ground of an assessment upon the property, but says he is willing to take the deed when the vendor can give him a good title, and on the next day the vendor, having paid off

the assessment, tenders the purchaser the deed again and requests performance of the contract, which the purchaser refuses on the ground that there are unexpired leases on the property, which was known to the purchaser and provided for in the contract, this last refusal of the purchaser to take the title puts an end to the contract, and he cannot recover back his payment made to the vendor. (*Page* agt. *McDonnell*, ante, 52.)

2. Where a seller of real estate tenders a deed to the purchaser and demands payment of the balance of the purchase-money, in pursuance of the terms of a written contract between them, the refusal of the purchaser to accept the deed and pay such money upon grounds not tenable, puts it in the power of the seller to put an end to the contract; and when this is done, the purchaser can neither enforce specific performance of the contract, nor recover back the portion of the purchase-money which he has paid. (*This case at general term is reported, ante, page 52.*) (*Page* agt. *McDonnell*, ante, 299.)

See ATTORNEY.

Goodenough agt. *Spencer* ante, 347.

3. When chattels are sold and delivered *conditionally*, the vendor's right to the property remains good as against the vendee, and his voluntary assignee and others, who purchase with knowledge of the condition, but not as against *bona fide purchasers* from the vendee. (*Wait* agt. *Green*, ante, 449.)

VERDICT.

1. The judge who tries a cause is not authorized to entertain a motion made upon his minutes to set aside a verdict upon the ground that it was contrary to the instructions of the court. (*Tinson* agt. *Welch*, 51 N. Y. R., 244.)

Digest.

W.

WAIVER.

1. The prohibition of the constitution of the state against compelling an accused person to be a witness against himself (Const., art. 1, § 6), may be waived by him, and is waived by his consenting to be a witness in his own behalf under the act of 1869, in relation to evidence in criminal prosecutions (chap. 678, Laws of 1869), and he thereby subjects himself to the same rules and tests applicable to other witnesses. (*Connors agt. The People*, 50 N. Y. R., 240.)

WITNESS.

1. A party may be examined as a witness in his own behalf to contradict a witness previously called and examined by him, where such party's testimony is not necessarily an impeachment of the witness. (*Hildreth agt. Shepard*, 65 Barb., 265.)
2. Thus, where a witness has testified that there was a consideration for certain drafts in suit, the party calling him may be allowed to prove, by his own testimony, that the drafts were accommodation paper. The testimony is admissible to show that the witness was mistaken as to the consideration. (*Id.*)
3. It is proper to show that a witness has made a statement inconsistent and irreconcilable with the facts to which he has testified. And if he denies that he has made any such statement, then to show that he has. And it is immaterial whether it be a statement of fact or the expression of an opinion, if it be adverse to his testimony. (*Schell agt. Plumb*, ante, 11.)
4. Where the date of a trip by witness to a certain place is material, on the trial of a civil action, it is

not material whether the witness, swearing on that subject, knew that the hotel where he staid kept a register. Therefore, although he swore intentionally false on the trial that he did not know such hotel kept a register, yet he was not guilty of perjury (*see 3 Parker*, 510). (*People agt. Pearsall*, ante, 121.)

5. Where a witness states a transaction occurred on a given date, he has no right to confirm or corroborate his evidence by showing a paper made and signed by him at that date. (*Id.*)
6. In this case it was held, that a witness called for the defense on cross-examination could not be asked whether he had not made a statement out of court inconsistent with what he had now sworn to in court (*see 50 New York*, 392; also *Schell agt. Plumb*, ante, p. 11). (*Id.*)
7. It is undoubtedly the rule that when a witness on cross-examination testifies to a collateral matter, the party making the cross-examination is not allowed to contradict that testimony, because a contrary rule would lead to the trial of numerous collateral issues. (*Newberry agt. Furnival*, ante, 139.)
8. But this rule never applies to testimony which is not collateral and which is material to the issue. When a party on cross-examination brings out evidence material to the issue, he is not necessarily bound by it, but may contradict it by other testimony. (*Id.*)

See COMMISSION.

Am. Linen Thread Co., ante, 403.

9. Under section 399 of the Code, as amended in 1860, in an action wherein a husband and wife were joined as parties plaintiff, the husband was a proper witness on behalf of the wife. (*Birdsall agt. Patterson*, 51 N. Y. R., 43.)

Digest.

WRIT OF ERROR.

See CRIMINAL LAW.

Dent agt. *People*, ante, 264.

1. A writ of error from this court to review a conviction and judgment in a criminal case only brings up the record and matters in the nature of a record, together with the bill of exceptions, if any, settled in the case. Only legal errors appearing in the record or by exceptions taken upon the trial can be considered. This court has no power to review an irregularity complained of, not appearing by the record, but occurring out of court, and presented by affidavits attached to the record and contained in the return. (*Gaffney* agt. *The People*, 50 N. Y. R., 416.)
2. Its jurisdiction is not extended in this respect in cases coming here on writs of error to the superior court of Buffalo, by the provisions

of section 35 of the act amending the act establishing that court (§ 35, chap. 361, Laws of 1857.) By the terms of that section the decisions of the general term of that court are only to be reviewed here "in the same cases and in the same manner as if made by the supreme court." (*Id.*)

WRIT OF PROHIBITION.

1. Writ of prohibition may issue out of the superior court of the city of New York to restrain an inferior court. (*Matter of Dowling*, ante, 7.)
2. The convention or board of police justices of New York, organized under the act of 1860, in appointing and removing clerks, does not act as a court to be restrained, nor their proceedings reviewed by writ of prohibition. (*Id.*)



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ERRATA.

In the case of *McMulkin* agt. *Bates* (*ante*, page 405), the name of "GEO. S. STITT, attorney for plaintiffs," should stand at the commencement of his points on page 405, instead of at the close on page 408. Also the second opinion of judge BRADY, on page 409, same case, should have had the date "November 1st, 1873," inserted before its commencement.

In the case of *Dusenbury et al.* agt. *Lehmner et al.* (*ante* page 417), the caption should be "*Supreme Court*," instead of "N. Y. Superior Court."



